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## Article

### **The Dakota Access Pipeline and the Destruction of Cultural Heritage: Applying the Crime Against Humanity of Persecution Before the ICC**

**Haydee J. Dijkstal\***

#### **Abstract**

The controversy surrounding the Dakota Access Pipeline has included claims by the Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribe that sites of religious and cultural significance including burial grounds are directly in the pipeline's planned route and would be destroyed by construction. This article aims to determine whether construction of the Dakota Access Pipeline violates international human rights and criminal law, and could leave corporation officials most responsible for the pipeline construction and operation vulnerable to investigation or prosecution for the crime against humanity of persecution before the International Criminal Court. The article examines how human rights law and the case law of international tribunals establish that the destruction of cultural property can constitute the denial of a fundamental right rising to the level of persecution as a crime against humanity. Examining the decision of the International Criminal Court to, for the first time, investigate and prosecute the destruction of cultural heritage, such as tombs and Mausoleums in Mali, as a war crime, the article sets out how the destruction of cultural property outside of an armed conflict could be pursued as a crime against humanity. The article concludes that there is a strong case to argue that the pipeline's construction would fit within the definition of a crime against humanity of persecution before the ICC, leaving corporation officials within the jurisdiction of the ICC vulnerable to a complaint and action

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before the ICC.

## I. INTRODUCTION

Instances where cultural heritage is threatened or destroyed in times of peace often particularly affect indigenous peoples.<sup>1</sup> For Native American tribes in the United States, sites and objects which are of cultural significance and importance are increasingly under threat as a result of commercial development ventures and interests.<sup>2</sup>

This issue has been raised in regards to both the Dakota Access Pipeline and the Keystone Pipeline, where the construction and subsequent operation of both pipelines threaten the destruction, or have already destroyed, sites of cultural heritage and importance such as ancestral graves, and sites and objects of religious and cultural significance.<sup>3</sup> After it was reported on November 16, 2017 that 210,000 gallons of oil spilled during the operation of the Keystone Pipeline in South Dakota near the boundaries of the Lake Traverse Reservation of the Sisseton Wahpeton Oyate Tribe,<sup>4</sup> a US District Court recognized that the Dakota Access Pipeline presents a similar risk to the land of several tribes, including the Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribe, whose land runs along the path of the pipeline, and that ongoing monitoring of the risks posed by the pipeline is required.<sup>5</sup> Similarly, the

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1. See Karima Bennouna, *Cultural Heritage is a Human Rights Issue*, HAKAM (Oct. 25, 2016), <https://hakam.org.my/wp/2016/10/25/karima-bennouna-cultural-heritage-is-a-human-rights-issue/>.

2. Steve Dubb, *Native Americans Face Environmental Threats from Alaska to New Mexico*, NPQ (Oct. 9, 2017), <https://nonprofitquarterly.org/2017/10/09/native-americans-face-environmental-threats-alaska-new-mexico/>.

3. See, e.g., *infra* pp. 163–68; Steven Mufson & Chris Mooney, *Keystone Pipeline Spills 210,000 Gallons of Oil on Eve of Permitting Decision for TransCanada*, WASH. POST (Nov. 16, 2017), <https://www.washingtonpost.com/news/energy-environment/wp/2017/11/16/keystone-pipeline-spills-210000-gallons-of-oil-on-eve-of-key-permitting-decision/>; Valerie Volcovici & Richard Valdmanis, *Keystone's Existing Pipeline Spills Far More Than Predicted to Regulators*, REUTERS (Nov. 27, 2017, 6:02 AM), <https://www.reuters.com/article/us-usa-pipeline-keystone-spills/keystones-existing-pipeline-spills-far-more-than-predicted-to-regulators-idUSKBN1DR1CS>.

4. See, e.g., Mitch Smith & Julie Bosman, *Keystone Pipeline Leaks 210,000 Gallons of Oil in South Dakota*, N.Y. TIMES (Nov. 16, 2017), <https://www.nytimes.com/2017/11/16/us/keystone-pipeline-leaks-south-dakota.html>.

5. Memorandum Opinion at 5, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 280 F.Supp.3d 187 (D.D.C. 2017) (No. 16-1534 (JEB)).

recent actions to revoke and replace the Bear Ears Monument, and the protections covering large areas containing “hundreds of thousands of objects of historic and scientific importance, many traditional cultural properties, and many sacred sites” prompted the Hopi Tribe, Navajo Nation, Ute Indian Tribe, Ute Mountain Ute Tribe, and Zuni Tribe to take civil action alleging that the removed protections opens these lands up to private oil and gas development which could cause “significant and irreversible damage to this culturally important landscape.”<sup>6</sup>

The ICC set an important precedent that individuals who are most responsible for the destruction of cultural heritage could be held criminally responsible under international law for the commission of a war crime with the International Criminal Court’s recent conviction of Ahmad Al Faqi Al-Mahdi, an alleged member of the militant group Ansar Eddine, for “intentionally attacking” historic monuments and buildings dedicated to religion such as mausoleums and a mosque.<sup>7</sup>

This article focuses on events regarding the construction and operation of the Dakota Access Pipeline and considers instances where objects and sites of cultural significance and importance have been threatened or destroyed. For the purpose of analysis, the article focuses, as a means of example or case study, on one documented instance where allegations have been made that cultural heritage was destroyed in South Dakota by construction efforts on the pipeline.<sup>8</sup> The article will examine these events through the lens of international criminal law to consider whether actions by the corporations involved in the construction of the pipeline, which led to the destruction and irreparable damage of cultural and religious heritage sites to the Tribes, could be investigated and prosecuted before the ICC when the destruction of these sites occurs outside of an armed conflict.

The article demonstrates how the Rome Statute similarly allows for the destruction of cultural heritage to be addressed by the Court when it occurs outside of an armed conflict by examining the decision of the International Criminal Court (ICC) to investigate and prosecute, for the first time, the destruction of cultural heritage in Mali as a war crime. The

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6. Complaint for Injunctive Relief and Declaratory Relief at 45, Hopi Tribe, v. Trump, No. 1:17-cv-02590 (D.D.C. Dec. 4, 2017).

7. Prosecutor v. Al Mahdi, ICC-01/12-01/15-171, Judgment and Sentence, ¶ 64 (Sept. 27, 2016) [hereinafter Al-Mahdi Judgment].

8. *Infra* pp. 163–68.

article proposes that Article 7 of the Rome Statute allows for the destruction or damage of cultural heritage outside of an armed conflict to be pursued as a crime against humanity of persecution.

In order to make this determination, the article will first review the background of the sites of cultural and religious heritage which were either destroyed or damaged by construction of the pipeline. Second, the article will review the development of protections for cultural property and heritage under international law which has become part of customary international law. Third, the article will describe the case law of the International Tribunal for the Former Yugoslavia (ICTY) which has demonstrated a clear practice of applying individual criminal responsibility for the destruction of cultural property and heritage as a crime against humanity of persecution. Considering that this application of the crime against humanity of persecution before the ICTY concerned only instances of destruction and damage during an armed conflict, the article will examine the required elements for a crime against humanity of persecution committed during times of peace under the Rome Statute. While the article will set out the contextual elements required for proving the commission of a crime against humanity of persecution, the focus of it will remain on how the underlying crime of persecution can be applied to situations where cultural heritage is damage or destroyed during times of peace.

The article will conclude that the destruction and damage of cultural heritage can be considered an underlying act for the crime of persecution as a crime against humanity before the ICC, and that there is a strong case to argue that the pipeline's construction would fit within the definition of a crime against humanity of persecution before the ICC.

## II. PRELIMINARY MATTERS

This article considers the question of whether instances during the construction and operation of the Dakota Access Pipeline, which resulted in the destruction of cultural heritage, could constitute a crime against humanity of persecution under the Rome Statute. The analysis that follows considers only the definition and application of a crime against humanity of persecution under Article 7 of the Rome Statute with an in-depth analysis of the required preliminary issues which must be

considered before a particular prosecution or investigation can be initiated; namely jurisdiction and gravity.

While this article's primary aim is to provide an analysis of the application of the crime against humanity to an instance of destruction of cultural heritage without making a conclusion on the likelihood of an investigation or prosecution into the events concerning the Dakota Access Pipeline, this paper is not presented merely in the abstract. The issues of jurisdiction and gravity are hurdles which will be considered, crossed, and possibly be met. A cursory look indicates that they are.

Jurisdiction before the ICC would affect the practical ability of the ICC to address the events surrounding the Dakota Access Pipeline. Because the United States is not a member of the Rome Statute, the Court would not have jurisdiction to investigate and prosecute crimes taking place on its territory unless the United States voluntarily lodged an Article 12(3) declaration to accept the ICC's exercise of jurisdiction over the crimes, or if the UN Security Council took a decision to refer the crimes to the ICC as a matter affecting peace and security under Chapter VII of the UN Charter.<sup>9</sup> As the US is not likely to voluntarily subject itself to the jurisdiction of the ICC anytime soon, and the UN Security Council would be unlikely to find that the events concerning the pipeline are a threat to peace and security, the other option for achieving jurisdiction is based on the nationality of the suspect or accused. Article 12(2)(b) of the Rome Statute grants jurisdiction over crimes where the suspect or accused is a national of a State Party to the Statute.<sup>10</sup> It is possible that corporate officials responsible for ownership or construction of the pipeline who are nationals of an ICC member State could fall under the jurisdiction of the Court, and be held individually criminally responsible.<sup>11</sup>

The gravity of the potential cases which would arise before the ICC must also be noted as a hurdle which must be addressed before any movement could practically be made with an investigation or prosecution on this topic before the ICC. As an issue regarding the admissibility, an assessment of whether these cases would meet the gravity threshold under Article

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9. U.N. Charter art. 39–51.

10. Rome Statute of the International Criminal Court art.12, July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

11. See *How the Court Works*, ICC, <https://www.icc-cpi.int/about/how-the-court-works> (last visited Nov. 12, 2018).

53(1)(c) of the Rome Statute<sup>12</sup> considers “the scale, nature, and manner of commission of the crimes, and their impact, bearing in mind the potential cases that would be likely to arise from an investigation of the situation.”<sup>13</sup>

In the Al-Mahdi case, the Prosecution found sufficient gravity in regard to the destruction of religious and historical sites based on these factors. In short, the scale of the potential crimes was demonstrated by a “series of attacks” against significant sites,<sup>14</sup> and the nature of the crimes was affected because the Prosecution found the events affect sites and objects “whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of the people.”<sup>15</sup> The manner of the commission of the crimes was affected by the repeated instances of destruction and the impact of the crimes was demonstrated because they “shocked the conscience of humanity.”<sup>16</sup>

A similar analysis could be conducted for the cases concerning the destruction of cultural heritage as a result of construction and operation of the Dakota access pipeline. While this paper only addresses one instance of destruction as a case study to whether the crime against humanity of persecution could be applied, the construction of the pipeline resulted in the destruction of cultural heritage, along the entire course of the pipeline.<sup>17</sup> When analyzing the possibility of bringing potential cases of destruction of cultural heritage concerning construction along the entire pipeline, it seems that all four gravity factors – scale, nature, impact and manner of commission of the crime – are met. In regards to the scale and manner of commission of the potential crimes, these factors could be demonstrated by the repeated acts of destruction. When assessing the nature of the potential crimes in accordance with the elements of the crime against humanity of persecution under Article 7(1)(h) which requires the deprivation of “fundamental rights”, it can be

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12. Rome Statute, *supra* note 10, art. 53(1)(c).

13. *Policy Paper of Preliminary Examinations*, ¶ 9, ICC (Nov. 2013), [https://www.icc-cpi.int/iccdocs/otp/OTP-Policy\\_Paper\\_Preliminary\\_Examinations\\_2013-ENG.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-Policy_Paper_Preliminary_Examinations_2013-ENG.pdf).

14. *Situation in Mali Article 53(1) Report*, ¶ 154, ICC, (Jan. 16, 2013), [https://www.icc-cpi.int/itemsDocuments/SASMaliArticle53\\_1PublicReportENG16Jan2013.pdf](https://www.icc-cpi.int/itemsDocuments/SASMaliArticle53_1PublicReportENG16Jan2013.pdf) [hereinafter *Mali Article 53(1) Report*].

15. *Id.* ¶ 155 (citing Y. Sandoz and others, “Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949”).

16. *Id.* ¶ 156–57.

17. *Infra* pp. 163–65.

demonstrated that the nature of the crimes is sufficient to meet the gravity threshold considering that the objects and sites destroyed included burial sites and ancestral graves, and stone rings and effigies which were unique and significant to the cultural and history of the tribes, as noted further below.<sup>18</sup> In regards to impact, as discussed further below, the tribes affected by the destruction have set out the grave impact of the potential crimes on their cultural and history, and the protests and national controversy surrounding the pipeline demonstrate the effect these acts have had nationally and internationally.<sup>19</sup> This short breakdown of each factor in the gravity assessment shows that a finding of sufficient gravity is possible.

Therefore, there is a possibility that the issues of both jurisdiction and gravity could be overcome to allow an investigation and prosecution, but a final conclusion on these matters would depend fully on the facts of the allegations and the evidence provided. This would require further analysis.

### III. SITES OF CULTURAL AND RELIGIOUS HERITAGE

Construction of the Dakota Access Pipeline was completed in April 2017 and first deliveries through the pipeline commenced on May 14, 2018.<sup>20</sup> On June 1, 2017, it was announced that commercial service began through the Pipeline transporting crude oil from Bakken, North Dakota to Pakota, Illinois.<sup>21</sup>

Since the intention to build the pipeline was announced in June 2014, there has been significant opposition to its construction due to the pipeline's planned route along and near the Standing Rock Indian Reservation in North Dakota.<sup>22</sup> A

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18. ICC, ELEMENTS OF CRIMES 10 (2011), <https://www.icc-cpi.int/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf> [hereinafter ICC, ELEMENTS OF CRIMES].

19. *Infra* pp. 163–68, 208, 209.

20. Jarrett Renshaw, *East Coast Refiner Shuns Bakken Delivery as Dakota Access Pipeline Starts*, REUTERS (Apr. 18, 2017, 11:38 PM), <https://www.reuters.com/article/us-north-dakota-pipeline-pes-idUSKBN17L0BJ>.

21. Timothy Cama, *Dakota Access Pipeline Now in Service*, HILL (June 1, 2017, 10:02 AM EDT), <https://thehill.com/policy/energy-environment/335898-dakota-access-pipeline-now-in-service>.

22. Plaintiff Standing Rock Sioux Tribe's Memorandum in Support of its Motion for Partial Summary Judgment at 1–6, *Standing Rock Sioux Tribe v.*



number of Native American tribes along the path of the pipeline, including the Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribe, argued that the pipeline's construction would significantly destroy or irreparably damage sites of cultural importance to the Tribe's cultural and religious heritage, including burial sites and other culturally significant sites which were either in the direct path of the pipeline or nearby.<sup>23</sup>

Pipeline construction crews graded a stretch of land, which destroyed many cultural sites, that were identified in legal proceedings, such as burial grounds, rock cairns, and stone structures.<sup>24</sup> Even after on-going protests, warnings on adverse cultural effects,<sup>25</sup> Tribes opposing the granting of construction permits<sup>26</sup>, and a request for injunctive relief,<sup>27</sup> these sites were still destroyed or irreparably damaged.

The Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribe have consistently argued that construction of the pipeline would harm and destroy "historically and religiously important" sites to both Tribes.<sup>28</sup> To highlight the adverse effects, the Tribes have "participated extensively in the public process associated with the permits, including filing numerous formal technical and legal comments[s,]"<sup>29</sup> and have provided legal submissions and evidence that show how culturally and historically significant the sites in the pipeline's path are to the

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U.S. Army Corps of Eng'rs, No. 16-1534 (JEB) (D.D.C. Feb. 14, 2017) [hereinafter Memorandum of Feb. 14, 2017].

23. See Declaration of Jon Eagle, Sr. in Support of Motion for Preliminary Injunction ¶¶ 3, 12, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 16-1534 (JEB) (D.D.C. Aug. 4, 2016) [hereinafter Eagle Declaration of Aug. 4, 2016].

24. Declaration of Tim Mentz, Sr. in Support of Motion for Temporary Restraining Order ¶¶ 2-5, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 16-1534 (JEB) (D.D.C. Sept. 4, 2016) [hereinafter Mentz Declaration of Sept. 4, 2016].

25. See, e.g., Declaration of Dave Archambault II in Support of Motion for Preliminary Injunction, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 16-1534 (JEB) (D.D.C. Aug. 4, 2016) [hereinafter Archambault Declaration of Aug. 3, 2016].

26. Complaint for Declaratory and Injunctive Relief ¶ 80, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 16-1534 (JEB) (D.D.C. July 27, 2016) [hereinafter Complaint of July 27, 2016].

27. *Id.* ¶ 1.

28. Memorandum of Feb. 14, 2017, *supra* note 22, at 7-9; Memorandum in Support of Emergency Motion for a Temporary Restraining Order at 3, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, No. 16-1534 (JEB) (D.D.C. Sept. 4, 2016) [hereinafter Memorandum of Sept. 4, 2016].

29. Complaint of July 27, 2016, *supra* note 26.

Tribes, as well as how these sites are in risk of damage and destruction.<sup>30</sup> The evidence set out the extent of damage caused by the pipeline would be along the “entire 1,100 [mile] route of the pipeline”.<sup>31</sup>

It is acknowledged that concerns have been voiced about the effect of construction and operation of the pipeline along many parts of its routes from North Dakota to Illinois.<sup>32</sup> Likewise, arguments made about the adverse effect of the pipeline have ranged from the destruction of cultural heritage to the environmental impact of the pipeline to water sources near the pipeline.<sup>33</sup> The range of concerns on the pipeline’s effect on the Tribes are not limited to destruction and damage to burial grounds and sites of religious and cultural worship, but also the Tribe’s relationship with water sources, such as the Missouri River and Lake Oahe in North and South Dakota, which are “sacred to the [Standing Rock Sioux Tribe] and are central to the Tribe’s practice of religion.”<sup>34</sup> However, for the purpose of this article, the destruction and damage of cultural heritage in one instance will be examined to use this instance as a case study on its application to international criminal law, without disregarding the fact that cultural heritage was affected in many other locations along the pipeline.

This article will focus on the damage and destruction to sites of religious and cultural heritage to the Standing Rock Sioux Tribe and Cheyenne River Sioux Tribe near Canon Ball, North Dakota and for which legal submissions were submitted to the U.S. District Court for the District of Columbia.<sup>35</sup> The evidence included declarations filed by several experts on tribal historical preservation for the Standing Rock Sioux Tribe<sup>36</sup> as well as by

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30. Complaint of July 27, 2016, *supra* note 26, ¶¶ 76–80; Supplemental Declaration of Tim Mentz, Sr. in Support of Motion for Preliminary Injunction ¶¶ 11–16, *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, No. 16-1534 (JEB) (D.D.C. Sept. 2, 2016) [hereinafter *Mentz Declaration of Sept. 2, 2016*].

31. Eagle Declaration of Aug. 4, 2016, *supra* note 23, ¶ 17.

32. *Id.* ¶ 40.

33. Complaint of July 27, 2016, *supra* note 26, ¶¶ 74–76.

34. *Id.* ¶¶ 77–79; Memorandum of Feb. 14, 2017, *supra* note 22, at 4.

35. See Complaint of July 27, 2016, *supra* note 26.

36. See, e.g., *Mentz Declaration of Sept. 4, 2016, supra* note 24; *Mentz Declaration of Sept. 2, 2016, supra* note 30; *Declaration of Tim Mentz, Sr. in Support of Motion for Preliminary Injunction, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, No. 16-1534 (JEB) (D.D.C. Aug. 11, 2016) [hereinafter *Mentz Declaration of Aug. 11, 2016*]; *Eagle Declaration of Aug. 4, 2016, supra* note 23.

the Chairman of the Standing Rock Sioux Tribe.<sup>37</sup> The submissions and evidence specifically noted that “[c]onstruction of the pipeline, which includes clearing and grading a 100–150 foot access pathway nearly 1200 miles long, digging a trench as deep as 10 feet, and building and burying the pipeline, would destroy burial grounds, sacred sites, and historically significant areas on either side of Lake Oahe.”<sup>38</sup> The expert declarations stated that these sites which are of cultural and religious significance to not only the Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribe, but also the Mandan and the Arikara tribes, were either in the direct path of the pipeline, or in close enough vicinity that the effects of construction would irreparably damage or destroy the sites.<sup>39</sup> It was submitted that construction would “without a doubt” destroy these historical and cultural sites.<sup>40</sup>

Stone structures were one of the most prevalent cultural sites that risked damage and destruction. The cultural and spiritual significance of these sites were explained as sites where Tribal members “made commitments for the people and where spiritual pledges were fulfilled” and where an individual would find “vital spiritual connection through prayer and commitment at these stone features.”<sup>41</sup> The cultural and religious significance of the stone features, and detriment to the Tribes when destroyed, has been described as follows:

The Tribe and the members of the Standing Rock have direct ties to the stone features. Many have sacred medicine bundles that are tied to these stone feature sites. When these sites are adversely impacted, it destroys the spiritual connection to these individuals. We shall see the continued destruction of our spiritual places if the court doesn’t intervene. This destruction greatly harms the Tribe generally, and members of the Tribe like

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37. See, e.g., Second Declaration of Dave Archambault II, Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs, No. 16-1534 (JEB) (D.D.C. Feb. 9, 2017) [hereinafter Archambault Declaration of Feb. 9, 2017]; Archambault Declaration of Aug. 3, 2016, *supra* note 25.

38. Complaint of July 27, 2016, *supra* note 26, ¶ 76; Mentz Declaration of Sept. 2, 2016, *supra* note 30, ¶¶ 1–4.

39. Eagle Declaration of Aug. 4, 2016, *supra* note 23, ¶ 12.

40. Mentz Declaration of Aug. 11, 2016, *supra* note 36, ¶ 35.

41. *Id.* ¶¶ 11–12.

myself.<sup>42</sup>

In addition, grave sites and burial grounds were located in areas which would be disturbed by construction both during the preparatory stages of construction on the ground surface and once the pipeline was constructed below the ground.<sup>43</sup> The Tribes made submissions about the “high concentration of gravesites”<sup>44</sup> along the path of the pipeline and highlighted the heightened cultural and religious importance of the identified grave sites and burial grounds which existed within the stone features<sup>45</sup> and included the graves of important chiefs to the Tribes.<sup>46</sup>

The Tribes considered that the proposed route of the pipeline under burial sites near Lake Oahe would result in “desecrat[ion]” of the graves “in much the same manner as placing a pipeline under a formal cemetery,”<sup>47</sup> and emphasized that work preparing the ground for construction or to create access pathways would destroy cultural burial grounds. For example, legal and expert submissions warned of destruction to cultural sites identified near Cannon Ball, North Dakota, and sought injunctive relief, but grading was conducted by construction crews in September 2016 resulting in the damage and destruction of gravesites, as well as stone structures, cairns and stone rings. Each of these sites, including some burial grounds, were particularly vulnerable to damage and destruction as they rested on the ground’s surface. The burial grounds highlighted were traditionally placed near the surface of the ground with rock cairns placed over them.<sup>48</sup>

The harm caused to the Tribe members affected the individual’s cultural and religious beliefs and traditions. After the destruction of the gravesites near Canon Ball, the Tribes set out the importance of allowing the human remains to be

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42. *Id.* ¶ 41.

43. *See, e.g.*, Mentz Declaration of Aug. 11, 2016, *supra* note 36, ¶ 37.

44. Mentz Declaration of Sept. 4, 2016, *supra* note 24, ¶ 8; Mentz Declaration of Aug. 11, 2016, *supra* note 36, ¶ 37 (“The DAPL is going right through these areas we have already inventoried. Numerous burials were encountered along with stone buffalo effigies, huge multiple stone ring complexes and landscapes specific to buffalo spirit callers, a special spiritual man within out spiritual walks of life.”).

45. Mentz Declaration of Aug. 11, 2016, *supra* note 36, ¶ 16 (explaining that stone structures are often the “final grave site” of an individual after the individual dies).

46. Memorandum of Sept. 4, 2016, *supra* note 28, at 3.

47. Archambault Declaration of Feb. 9, 2017, *supra* note 37, ¶ 16.

48. Mentz Declaration of Sept. 4, 2016, *supra* note 24, ¶ 8.

reburied in order to “help deal with the loss and hurt of disturbing these graves.”<sup>49</sup> It was highlighted that the destruction or damage to these sites is irreparable and with “no ‘fix’ in mitigation for these types of sites” because “[d]estruction of these sites will eventually destroy generations of family connections to these areas of spiritual power” and these sites “are important to the survival and recovery of [the Tribes] spiritual traditions.”<sup>50</sup> The emotional pain and long term significance to the Tribe’s cultural preservation was further highlighted with submissions with anecdotes such as:

My grandfather and great grandfather fought in war with the U.S. Calvary in this valley and other enemy tribes to defend these stone feature sites. The destruction of these sites would be very personally painful to me and is very harmful to the cultural survival of the Tribe. Once lost they can never be restored.<sup>51</sup>

#### IV. THE DEVELOPMENT OF PROTECTIONS FOR CULTURAL PROPERTY AND HERITAGE UNDER INTERNATIONAL LAW

Since the late 1800s, international law has developed protections for cultural property and heritage and created accountability mechanisms to redress its destruction or damage. It has been recognized that “the preservation of cultural heritage is a growing international concern”<sup>52</sup> and has become part of customary international law. Although protections of cultural property and heritage have “been reiterated repeatedly in successive multilateral instruments” since the late 1800s,<sup>53</sup> there is a clear progression in the scope of protection each document covers.

Early documents recognizing the need for codified protection focused on the protection of cultural property and the rights of

49. *Id.* ¶ 9.

50. Mentz Declaration of Aug. 11, 2016, *supra* note 36, ¶ 19.

51. *Id.* ¶ 37.

52. Prosecutor v. Al Mahdi, ICC-01/12-01/15-214-AnxII-Red2, Expert Report- Reparations Phase, Dr. Marina Lostal, ¶ 23 (Aug. 11, 2017) [hereinafter Al-Mahdi Reparations Order].

53. Ana Filipa Vrdoljak, *The Criminalisation of the International Destruction of Cultural Heritage*, in FORGING A SOCIO-LEGAL APPROACH TO ENVIRONMENTAL HARM: GLOBAL PERSPECTIVES 1, 2 (2016).

the State where the property was located but failed to explicitly use the term “heritage” to describe the protected sites. Some of these documents included basic provisions on the prohibition against plunder or pillage of property but went on to recognize the protection of certain types of property which draw on the concept of heritage, including institutions and buildings dedicated to art, science, education or the religion of a society.

For example, the 1874 Brussels Declaration is said to be one of the first international documents which set out a prohibition on destroying cultural property during times of war following the destruction of the cathedral and library in Strasbourg during the Franco-Prussian War.<sup>54</sup> Although the document was never ratified,<sup>55</sup> it demonstrates a move towards a consciousness on what objects should be protected during times of war.<sup>56</sup> The document’s protections included the prohibition that a “town taken by assault ought not to be given over to pillage by the victorious troops,”<sup>57</sup> but broadened the scope of its protections and remedies in Article 8 of the document by prohibiting the “seizure or destruction of, or wilful damage to, institutions [dedicated to religion, charity and education, the arts and sciences], historic monuments, works of art and science,” and making any such acts “subject of legal proceedings by the competent authorities.”<sup>58</sup>

This prohibition was further memorialized in the Hague Convention of 1907 (the “Hague Regulations”) on the Laws and Customs of Wars on Land. The Regulations, which were “envisaged as protection of state sovereignty over the property that was at stake”<sup>59</sup> required that “all necessary steps must be taken to spare” such cultural property as “buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected.”<sup>60</sup> Destruction of these sites was made subject to

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54. *Id.*

55. *Id.*; Yaron Gottlieb, *Criminalizing Destruction of Cultural Property: A Proposal for Defining New Crimes Under the Rome Statute of the ICC*, 23 PENN ST. INT’L L. REV. 857, 860 (2005).

56. Gottlieb, *supra* note 55, at 860.

57. Project of an International Declaration Concerning the Laws and Customs of War art. 18, Aug. 27, 1874 (Brussels Declaration).

58. *Id.* art. 8.

59. BRITISH INST. OF INT’L AND COMPARATIVE LAW, THE PROTECTION OF CULTURAL HERITAGE IN CONFLICT 5 (2013) [hereinafter BIICL REPORT].

60. Hague Convention (IV) Respecting the Law and Customs of War on Land art. 27, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631

individual criminal responsibility in Article 56 which, in language similar to the Declaration of Brussels, provided that “seizure of, destruction or wilful damage done to institutions [dedicated to religion, charity and education, the arts and sciences], historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.”<sup>61</sup>

Following the Hague Regulations, later documents began to conceptualize the protections granted as over the property itself, and not the State where the property was located.<sup>62</sup> However, this understanding of what was the object of protection still only covered cultural property, and not heritage, and only during times of armed conflict.

This was the case with the Preliminary Peace Conference of Paris in 1919 as well. As a result of cultural sites destroyed in World War I such as churches and libraries, the Preliminary Peace Conference of Paris in 1919 addressed similar protections during armed conflict.<sup>63</sup> The Conference created the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties “for the purpose of inquiring into the responsibilities relating to the war.”<sup>64</sup> The Commission’s report presented to the Preliminary Peace Conference addressed issues of individual criminal responsibility by including a list of war crimes which included the crime of “wanton destruction of religious, charitable, educational, and historic buildings and monuments.”<sup>65</sup>

Perhaps the pinnacle of individual criminal responsibility to this point, for acts of damage and destruction to cultural property, came with the Nuremberg Charter and Tribunal. Following World War II, the Charter of the Nuremberg Tribunal further demonstrated the acceptance of adopting international crimes for the destruction of cultural property during armed conflict. Article 6(b) of the Charter reverted to the basic and limited terminology of “plunder of public or private property” or “wanton destruction of cities, towns or villages” when setting out

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[hereinafter 1907 Hague Convention].

61. *Id.* art. 56.

62. BIICL REPORT, *supra* note 59 (indicating that protection was over “the cultural property as the object of protection”).

63. See M. Adatei, *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, 14 AM. J. INT’L L. 95, 95 (1920).

64. *Id.*

65. *Id.* at 115.

applicable war crimes for which the perpetrator can be held individually responsible.<sup>66</sup> However, in practice, Article 6(b) was applied before the International Military Tribunal at Nuremberg in count three of the indictment, which listed war crimes under Article 6, section E on “plunder of public and private property”<sup>67</sup> with the crime of plunder including the destruction of property such as “cultural monuments” and “scientific institutions.”<sup>68</sup> The International Military Tribunal’s Judgment also highlighted that the Tribunal considered a wide range of properties which speak to the heritage of the cultural property harmed. For example, among the accused, Alfred Rosenberg was found individually responsible under this provision for acts including the plunder of “museums and libraries, confiscated art treasures and collections.”<sup>69</sup>

The Additional Protocols of the 1949 Geneva Conventions provided further protection during armed conflicts of both an international and non-international character with both Protocol I and II prohibiting “acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.”<sup>70</sup> State acceptance of the Protocols is overwhelming with 174 States ratifying Protocol I, and 169 States ratifying Protocol II.<sup>71</sup>

It wasn’t until 1954 that the object of protection in

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66. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal art. 6(b), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

67. 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 55 (1947).

68. *Id.* at 55–56.

69. 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 540 (1948) [hereinafter NUREMBERG JUDGMENT]; *see also* Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment, ¶ 228 (Mar. 3, 2000).

70. *See* Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts art. 16, June 8, 1977, 1125 U.N.T.S. 609; Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 53(a), June 8, 1977, 1125 U.N.T.S. 3.

71. *See* Treaties, State Parties, and Commentaries, ICRC, [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=470](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470) (last visited Dec. 20, 2018) (listing state parties to Protocol I); Treaties, State Parties, and Commentaries, ICRC, [https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=475](https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=475) (last visited Dec. 20, 2018) (listing state parties to Protocol II).



international instruments was extended to explicitly cover cultural heritage in addition to cultural property, but also to recognize the human link to these physical properties and sites.<sup>72</sup> To this, the 1954 Hague Convention for the Protection of Cultural Property in the Event of an Armed Conflict and its First Protocol of 1954 and Second Protocol of 1999 are important to the growing protection under international law for several reasons. First, the Convention expanded the scope of protection by using the term “heritage” as opposed to the texts of the past which focused on the materialistic protection of only cultural “property.”<sup>73</sup> Next, the Second Protocol of 1999 established individual criminal responsibility for violations of these prohibitions.<sup>74</sup> Last, the Convention and its Protocols specifically recognized that sites guarded by the Convention are done so in order to protect interests and rights of the people who value these sites.<sup>75</sup> Article 1(a) of the Convention makes both points clear by defining cultural property as “movable or immovable property of great importance to the cultural heritage of every people,”<sup>76</sup> and the Protocols of 1954 and 1999 reference, and thus support, this definition.<sup>77</sup> Importantly, the Preamble of the Convention further highlights both these points by stating that:

Being convinced that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world;

Considering that the preservation of the cultural

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72. Corine Wegener, *The 1954 Hague Convention and Preserving Cultural Heritage*, 1, *ARCHAEOLOGICAL INST. AM.* (Oct. 19, 2010), <https://www.archaeological.org/sites/default/files/files/Wegener%20v2.pdf>.

73. *Id.*

74. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict art. 15–21. Mar. 26, 1999, 2253 U.N.T.S. 212, 218–20 [hereinafter Second Protocol]; see also ZUOZHEN LIU, *THE CASE FOR REPATRIATING CHINA’S CULTURAL OBJECTS* 34 (2016).

75. Francesco Francioni, *The Human Dimension of International Cultural Heritage Law: An Introduction*, 22 *EUR. J. INT’L L.* 9, 13 (2011) (“It is interesting to note that this statement speaks of ‘people’ and not states”).

76. Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 1(a), May 14, 1954, 249 U.N.T.S. 240, 242 [hereinafter 1954 Hague Convention].

77. Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 1, May 14, 1954, 249 U.N.T.S. 358 [hereinafter First Protocol]; Second Protocol, *supra* note 74, art. 1(b).

heritage is of great importance for all peoples of the world and that it is important that this heritage should receive international protection.<sup>78</sup>

With adoption of the Hague Convention of 1954, there was a clear recognition that the prohibition against the destruction or damage of cultural property and heritage had gained the status of customary international law.<sup>79</sup> Widespread international practice and acceptance of the protection of cultural property led to this recognition, evidenced by the extensive acceptance of the Additional Protocols of the 1949 Geneva Conventions, and the Nuremberg Tribunal's recognition that the protections set out in the 1907 Hague Regulations "were recognized by all civilized nations" and based on the general laws and customs of war at the time.<sup>80</sup>

Commentary on the influence of the Hague Convention of 1954 recognizes it as the "paramount international instrument"<sup>81</sup> and notes that "consistent and unambiguous practice"<sup>82</sup> has resulted from "the basic principles . . . [which] have become part of customary international law."<sup>83</sup>

By the time of the adoption of the World Heritage Convention in 1972, international protection focused on "the protection of cultural heritage as a matter of public interest, and not only as part of private property rights."<sup>84</sup> Its adoption by 193 State parties "reflected and channelled the pre-existing international will" to protect cultural heritage<sup>85</sup> and gave it a

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78. 1954 Hague Convention, *supra* note 76, pmb1.

79. *See, e.g.*, 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW: RULES 129, 131 (2005); LIU, *supra* note 74, at 34; Francioni, *supra* note 75, at 11.

80. NUREMBERG JUDGMENT, *supra* note 69, at 253–54; Vrdoljak, *supra* note 53, at 3.

81. Jean-Marie Henckaerts, *New Rules for the Protection of Cultural Property in Armed Conflict*, 81 INT'L REV. RED CROSS 593, 593–94 (1999).

82. Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 EUR. J. INT'L L. 619, 635 (2003)..

83. Henckaerts, *supra* note 81, at 593–94; *see also* Prosecutor v. Al-Mahdi, ICC-01/12-01/15-214-Anx1-Red3, Brief by Ms. Karima Bennouna, 4 (Aug. 14, 2017) [hereinafter Al-Mahdi Report of Bennouna].

84. Francioni & Lenzerini, *supra* note 82, at 635.

85. Prosecutor v. Al-Mahdi, ICC-01/12-01/15-214-AnxII-Red2, Expert Report—Reparations Phase, ¶ 33 (Aug. 11, 2017) [hereinafter Al-Mahdi Report of Lostal]; *see also* Al-Mahdi Reparations Order, *supra* note 52, at ¶ 20 (adopting Al-Mahdi Report of Lostal).

“near-universal character.”<sup>86</sup> The Convention recognized “that parts of the cultural or natural heritage are of outstanding interest” and that its protection was important to “the world heritage of mankind as a whole.”<sup>87</sup> The Convention called for States to inventory sites of particular cultural heritage and significance for protection through international cooperation, but importantly stated that heritage sites not included within a State’s inventory “shall in no way be construed to mean that it does not have an outstanding universal value.”<sup>88</sup> The Convention also created a monitoring body, the World Heritage Committee, designed to monitor application of the Convention and specific sites at risk.<sup>89</sup>

What is particularly interesting about the World Heritage Convention’s adoption was that it was motivated by events which threatened cultural heritage outside of an armed conflict. Until this time, no document had contemplated or addressed the protection of cultural heritage (not just property) outside of an armed conflict during times of peace. The Convention was in response to the risk of damaging or destroying “ancient Nubian monuments in the rock temples of Abu Simbel in Egypt” as a result of the “construction of the Aswan High Dam on the Nile in 1954” which would flood the cultural sites.<sup>90</sup> Although the text of the World Heritage Convention only speaks to protections during an armed conflict and does not address protections in times of peace, the document was inspired by a threat to cultural heritage outside of an armed conflict (a construction project) and recognizes that “the cultural heritage and the natural heritage are increasingly threatened with destruction . . . by changing social and economic conditions.”<sup>91</sup> The major international instruments on cultural property and heritage protection had focused on protections during armed conflicts, but the events which inspired the Convention’s adoption, in effect are a nod to the direction in which protection is developing.

In 2003, UNESCO adopted the Declaration Concerning the International Destruction of Cultural Heritage, which is held as

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86. Francioni, *supra* note 75, at 11.

87. Convention Concerning the Protection of the World Cultural and Natural Heritage, pmbl, Nov. 16, 1972, 1037 U.N.T.S. 151 [hereinafter World Heritage Convention].

88. *Id.* art. 12.

89. *Id.* art. 8–13.

90. Al-Mahdi Report of Lostal, *supra* note 85, ¶ 33.

91. World Heritage Convention, *supra* note 87, pmbl.

“evidence of customary international law.”<sup>92</sup> Importantly, the UNESCO Declaration recognized the gap between protection of cultural heritage and property during armed conflict versus times of peace, and that the development of customary international law is developing towards closing this gap.<sup>93</sup> The Declaration notes the “development of rules of customary international law . . . related to the protection of cultural heritage in peacetime as well as in the event of armed conflict” and creates a duty for States to “take all appropriate measures to conduct them in such a manner as to protect cultural heritage” during peacetime activities.<sup>94</sup>

The development of international protections through these instruments and documents clearly supports a conclusion that the protection of both cultural property and heritage during armed conflict is part of customary international law. In practice, this is demonstrated through the reliance of the UN Security Council and General Assembly on these norms. For example, on July 5, 2012, the UN Security Council condemned the “desecration, damage and destruction of sites of holy, historic and cultural significance” in Mali in Resolution 2056,<sup>95</sup> and on February 22, 2014, called on States to protect Syria’s “rich societal mosaic and cultural heritage” and World Heritage Sites in Resolution 2139.<sup>96</sup> In Resolution 2199, the Security Council condemned “the destruction of cultural heritage in Iraq and Syria.”<sup>97</sup> Similarly, UN General Assembly 69/281 stressed the importance of cultural heritage in response to destruction of cultural heritage in Iraq carried out by the Islamic State by noting that “the destruction of cultural heritage, which is representative of the diversity of human culture, erases the collective memories of a nation, destabilizes communities and threatens their cultural identity,” and affirmed that attacks “amount to war crimes.”<sup>98</sup> However, like the Resolutions from the UN Security Council, the General Assembly only addressed

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92. Patty Gerstenblith, *The Destruction of Cultural Heritage: A Crime Against Property or a Crime Against People?*, 15 J. MARSHALL REV. INTELL. PROP. L. 336, 383 (2016).

93. UNESCO, 32 C/Res. 33 Annex, Declaration Concerning the International Destruction of Cultural Heritage, pmbl (Oct. 17, 2003) [hereinafter 2003 UNESCO Declaration].

94. *Id.* pt. IV.

95. S.C. Res. 2056, pmbl (July 5, 2012).

96. S.C. Res. 2139, pmbl (Feb. 22, 2014).

97. S.C. Res. 2199, ¶ 15 (Feb. 12, 2015).

98. G.A. Res. 69/281, pmbl, ¶ 5 (May 28, 2015).

the destruction in the context of an armed conflict and only noting war crimes as a criminal remedy; leaving protection of cultural heritage during peace time unaddressed.

Most notably, the UN Security Council adopted Resolution 2347 on March 24, 2017, which addressed the importance of the protection of cultural property.<sup>99</sup> In regards to accountability, the Resolution affirmed “that directing unlawful attacks against sites and buildings dedicated to religion, education, art, science or charitable purposes, or historic monuments may constitute, under certain circumstances and pursuant to international law a war crime and that perpetrators of such attacks must be brought to justice,” and while recognizing the ICC’s decision convicting Al-Mahdi of war crimes for attacks in Mali.<sup>100</sup> Again, the Resolution failed to recognize the importance of protecting cultural heritage during times of peace, and only emphasized the “unlawful destruction of cultural heritage, and the looting and smuggling of cultural property in the event of armed conflicts . . . .”<sup>101</sup>

Unlike the international norms protecting cultural property and heritage during armed conflict, “the protection of cultural [heritage and] property during peacetime is more ambiguous.”<sup>102</sup> Thus, peace-time protection of cultural heritage and property can be more accurately said to be in the process of ‘developing’ towards the status of customary international law, as evidenced by the 2003 UNESCO Declaration.<sup>103</sup> Scholarly writing has noted that it would be “far fetched to conclude that no legal protection is given to cultural property in peacetime[.]” but found that it is hard to conclude that an international norm rising to the level of customary international law has been established.<sup>104</sup> Nevertheless, the adoption of several instruments recognizing the importance of protecting sites of cultural heritage during times of peace is a step toward making this principle an international norm.

In addition to the 2003 UNESCO Declaration, several international documents mentioned protections during both times of war and peace, but as they pre-dated the trend toward protecting both property and heritage, only focused on property

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99. S.C. Res. 2347 (Mar. 24, 2017).

100. *Id.* ¶ 3–4.

101. *Id.* ¶ 1.

102. Gottlieb, *supra* note 55, at 872.

103. See 2003 UNESCO Declaration, *supra* note 93, pt. IV.

104. Gottlieb, *supra* note 55, at 872.

as the object of protection. These documents included the American Roerich Pact of 1935—signed by 11 States in South and Central America—which provided that the “same respect and protection shall be accorded to the historic monuments, museums, scientific, artistic, educational and cultural institutions in time of peace as well as in war.”<sup>105</sup> Likewise, protection of cultural property against illicit import, export and transfer of ownership, without mention of whether the protection covered the property during times of peace or war, was laid out in the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.<sup>106</sup>

The protection of both cultural heritage and property during times of peace had formerly been recognized by UNESCO in its Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works of 1968.<sup>107</sup> In recognizing the importance of cultural heritage to mankind, the Recommendation emphasized that protection “extend[ing] to the whole territory of the State” and not just to “certain monuments and sites”<sup>108</sup> and must be aimed at activities which take place during times of peace, including the “construction of pipelines and of power and transmission lines of electricity[.]”<sup>109</sup>

More recently, the Convention for the Safeguarding of Intangible Cultural Heritage was adopted by the UNESCO General Conference in 2003 and entered into force in 2006.<sup>110</sup> Not only did the Convention recognize that “no binding multilateral instrument as yet exists for the safeguarding of the intangible cultural heritage,”<sup>111</sup> but it also provided protection during peacetime for the “practices, representations,

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105. Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments art. 1, Apr. 15, 1935, 167 L.N.T.S. 289.

106. See Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231.

107. See UNESCO, 15 C/Res., Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works (Nov. 19, 1968).

108. *Id.* ¶ 3.

109. *Id.* ¶ 8(f).

110. Convention for the Safeguarding of the Intangible Cultural Heritage, Oct. 17, 2003, 2368 U.N.T.S. 35 [hereinafter ICH Convention]; *The States Parties to the Convention for the Safeguarding of the Intangible Cultural Heritage (2003)*, UNESCO, <https://ich.unesco.org/en/states-parties-00024> (last updated Nov. 5, 2018).

111. ICH Convention, *supra* note 110, pmb1.

expressions, knowledge, skills—as well as the instruments, objects, artefacts and cultural spaces associated therewith” which it considered to be intangible cultural heritage.<sup>112</sup> In addition, the UN Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly in 2007, also provides protection for cultural heritage during times of peace.<sup>113</sup> Article 31 of the Declaration sets out the right of indigenous peoples “to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions” and “to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.”<sup>114</sup> It has also been argued that the Declaration’s “*raison d’être* is the preservation and development of the cultural identity of indigenous peoples . . . .”<sup>115</sup>

Therefore, while it is difficult to conclude that an international norm rising to the level of customary international law has been established which protects international property and heritage during times of peace, the existence of a number of international instruments addressing protection during peacetime demonstrates a clear development in that direction. This development could lead to a norm under customary international law recognizing that cultural heritage and property are threatened not only during an armed conflict, but that the everyday economic and social activities of a society during peacetime could also put these sites at risk.

It must be noted that the recognition of such a norm is unnecessary to support criminal action when an act specifically violates an existing instrument which sets out individual criminal responsibility for violations of its protections, such as the Second Protocol of 1999 to the Hague Convention.<sup>116</sup> Instead, establishing a customary international law norm over the protection of cultural heritage during peacetime would assist with reaching the conclusion that an attack on cultural heritage during peacetime constitutes a deprivation of a group’s fundamental human rights contrary to international law, and thus, an act grave enough to rise to the level of a crime of

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112. ICH Convention, *supra* note 110, art. 2(1).

113. G.A. Res. 61/295, Declaration on the Right of Indigenous Peoples (Sept. 13, 2007).

114. *Id.* art. 31.

115. Francioni, *supra* note 75, at 15.

116. See Second Protocol, *supra* note 74.

persecution, as discussed in more detail below.<sup>117</sup>

#### V. DESTRUCTION OF CULTURAL HERITAGE AS A WAR CRIME UNDER INTERNATIONAL CRIMINAL LAW, AND THE ICC'S AL-MAHDI PROSECUTION

Although international instruments on the protection of cultural property and heritage can be said to be developing toward a consensus of protections during peacetime as well as during armed conflict, the legal texts and case law of international criminal tribunals have solely applied to instances of destruction of cultural property and heritage during armed conflicts.

The legal texts of the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) stand out as allowing for prosecutions when cultural heritage is destroyed; although, only as a war crime when committed during an armed conflict. The ECCC adopted the destruction of cultural property as a crime under its jurisdiction.<sup>118</sup> Based on a reading of the 1954 Hague Convention, which found that “damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind”, the ECCC’s Law on the Establishment of the Extraordinary Chambers grants, in Article 7, “the power to bring to trial all Suspects most responsible for the destruction of cultural property during armed conflict . . . .”<sup>119</sup> The ICTY codified the protection of cultural property under international humanitarian law as a crime under Article 3 of its statute.<sup>120</sup> Article 3 sets out violations of the laws and customs of war with section (d) giving the Tribunal the power to prosecute individuals violating the prohibition against “seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and

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117. *Infra* pp. 187–209.

118. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 7 (2001), *amended by* NS/RKM/1004/006 (Oct. 27, 2004) (unofficial translation) (Cambodia) [hereinafter ECCC Statute].

119. *Id.*

120. S.C. Res. 827, art. 3(d), Statute of the International Tribunal for the Former Yugoslavia (May 25, 1993) [hereinafter ICTY Statute].



science . . . .”<sup>121</sup>

This is in comparison to the statutes establishing the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone (SCSL) which give each body the power to prosecute persons for attacks against cultural property, but in the limited scope of only recognizing acts of pillage committed during an armed conflict as violations.<sup>122</sup> The Statutes of the ICTR and SCSL allow for the acts of pillage in violation of Common Article 3 of the Geneva Conventions and Additional Protocol II to be investigated and prosecuted as war crimes.<sup>123</sup>

While this article concludes that the destruction of cultural heritage and property occurring during peacetime may be addressed by the ICC as a crime against humanity, the ICC's Statute is similar to the legal texts of the ICTY, ECCC, ICTR and SCSL which only allow prosecutions for attacks on cultural property (i.e. providing protection for cultural heritage) during times of war.<sup>124</sup> With language mirroring the protections granted to cultural property under Article 27 of the Hague Convention of 1907,<sup>125</sup> Article 8(e)(iv) of the Rome Statute provides that “serious violations of the laws and customs applicable in armed conflicts not of an international character” include “[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected.”<sup>126</sup>

In addition, the case law of the ICC has only recently addressed the protection of cultural heritage. The case against Ahmad Al Faqi Al-Mahdi under Article 8(2)(e)(iv) of the Rome Statute marked the first time the ICC had brought charges for the destruction of cultural heritage under any provision of the

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121. *Id.*

122. S.C. Res. 1315, art. 3(f), Statute of the Special Court for Sierra Leone (Aug. 14, 2000) [hereinafter SCSL Statute]; S.C. Res. 955, art. 4(f), Statute of the International Tribunal for Rwanda (Nov. 8, 1994) [hereinafter ICTR Statute].

123. SCSL Statute, *supra* note 122; ICTR Statute, *supra* note 122; Micaela Frulli, *The Criminalization of Offences Against Cultural Heritage in Times of Armed Conflict: The Quest for Consistency*, 22 EUR. J. INT'L L. 203, 206 n.10 (2011).

124. See ECCC Statute, *supra* note 118; SCSL Statute, *supra* note 122; Rome Statute, *supra* note 10, art. 8; ICTR Statute, *supra* note 122; ICTY Statute, *supra* note 120.

125. 1907 Hague Convention, *supra* note 60, art. 27.

126. Rome Statute, *supra* note 10, art. 8.

Rome Statute, and in this case only as a war crime. While initiation of this case indicates a recognition by the ICC of the importance of crimes committed against cultural heritage, it gives no indication that it will consider the destruction of cultural heritage as a crime against humanity of persecution under Article 7 of the Rome Statute.

In the case against Ahmad Al Faqi Al-Mahdi, the ICC Pre-Trial Chamber issued an arrest warrant on September 18, 2015, accusing Al Mahdi of being individually criminally responsible for the war crime of intentionally directing attacks against historic monuments and buildings dedicated to religion, including nine mausoleums and one mosque in Timbuktu during an armed conflict not of an international character.<sup>127</sup> The trial was quickly resolved when Al-Mahdi made an admission of guilt on August 22, 2016,<sup>128</sup> and as a result the Trial Chamber issued a judgment on September 27, 2016 deciding that “the Chamber is satisfied beyond reasonable doubt that all the essential facts of the crime charged are proven” and as a result “convicts Mr. Al Mahdi as a co-perpetrator for attacking . . . protected objects in Timbuktu, Mali” pursuant to Articles 8(2)(e)(iv), 25(3)(a) and 65(2) of the Rome Statute.<sup>129</sup>

During the preliminary examination phase of the Situation in Mali, reports from the Office of the Prosecutor in 2012 and 2013 indicated that the Prosecution was examining and investigating the alleged acts as war crimes, while noting that “the information available does not provide a reasonable basis to believe that crimes against humanity under Article 7 have been committed in the Situation in Mali.”<sup>130</sup> The Prosecution’s report at the initiation of its formal investigation stated that its assessment on applicable crimes against humanity “may be revisited in the future,”<sup>131</sup> but the Court proceeded with issuing an arrest warrant on the basis of war crimes only.<sup>132</sup> The decision of the Prosecution not to investigate or prosecute the attacks against cultural heritage—bearing some similarities to

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127. Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15-1-Red, Mandat d’arrêt à l’encontre d’Ahmad AL FAQI AL MAHDI (Sept. 18, 2015) [hereinafter Al-Mahdi Arrest Warrant].

128. Al-Mahdi Judgment, *supra* note 7, ¶¶ 7, 98–100.

129. *Id.* ¶¶ 62–63.

130. *Mali Article 53(1) Report*, *supra* note 14, ¶¶ 8, 128; ICC, Office of the Prosecutor, Report on Preliminary Examination Activities 2012, ¶ 181 (Nov. 2012).

131. *Mali Article 53(1) Report*, *supra* note 14, ¶ 128.

132. Al-Mahdi Arrest Warrant, *supra* note 127, ¶¶ 3, 8.

the sites of cultural heritage damaged and destroyed during construction of the Dakota Access Pipeline—as a crime against humanity in the case of Mali, should not speak to the prospect of the ICC applying Article 7 to other incidents where cultural heritage is attacked during times of peace.

The Trial Chamber's strong findings in its recent Judgment and Reparations decisions on the importance of cultural heritage and "special protection of cultural property in international law"<sup>133</sup> indicate the ICC's willingness to view the protection of cultural heritage with a broad scope. The Trial Chamber's recent Reparations Order of October 17, 2017, drew significant parallels to the ways that destroying a community's cultural heritage deprives the population of its fundamental rights. For example, the Trial Chamber observed the "importance of the human right to cultural life and its physical embodiments" and that destruction of cultural heritage would violate this right by "depriv[ing] a community of its identity and memory, as well as the physical testimony of its past."<sup>134</sup> The Trial Chamber recognized that criminalizing its damage and destruction is not just about protecting property, but also about the individuals and communities affected; stating that "[c]ultural heritage is important not only in itself, but also in relation to its human dimension."<sup>135</sup>

Recognition of the human element when cultural heritage is attacked is critical to finding that crimes against humanity, under Article 7 of the Rome Statute, are applicable to the events concerning the Dakota Access Pipeline, and any other events involving the destruction of cultural heritage in times of peace.<sup>136</sup> This is because a crime against humanity is ultimately a crime about harm committed against humans, as noted in Article 7 of the Rome Statute, which plainly requires that a crime against humanity must be "directed against [a] civilian population."<sup>137</sup> For the underlying crime of persecution, the deprivation of a fundamental right must have been committed in a "collective nature" against a population or group of the

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133. Al-Mahdi Judgment, *supra* note 7, ¶¶ 13–14.

134. Al-Mahdi Reparations Order, *supra* note 52, ¶ 14.

135. *Id.* ¶ 16.

136. Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 36–37 (2001).

137. Rome Statute, *supra* note 10, art. 7.

people.<sup>138</sup>

The case law of the ICTY demonstrates that the destruction of cultural property can be viewed as a crime against humans which violates their fundamental human rights and creates a precedent for the ICC to similarly apply Article 7 to allegations of attacks on cultural heritage.

## VI. DESTRUCTION OF CULTURAL HERITAGE AS A CRIME AGAINST HUMANITY BEFORE THE ICTY

The destruction of cultural heritage has been recognised as a punishable offence not only as a war crime but also as a crime against humanity of persecution under international criminal law.<sup>139</sup> Before the International Criminal Tribunal for the Former Yugoslavia, a series of cases has supported the conclusion that the destruction of cultural property is an act of persecution and has issued convictions on the crime against humanity of persecution based on attacks against property and sites which held cultural importance.

In finding that acts of destruction of cultural heritage amount to the crime against humanity of persecution, several cases explicitly noted the human link between the act of destroying or damaging cultural heritage and the fundamental right of the individuals affected which elevates the acts to the crime of persecution as a crime against humanity. In the *Blaskic* case, the ICTY Trial Chamber identified the human element associated with the destruction of cultural heritage, which is required to constitute the denial of a fundamental right rising to the level of persecution as a crime against humanity. The Trial Chamber stated that “persecution may take forms other than injury to the human person, in particular those acts rendered serious not by their apparent cruelty but by the discrimination they seek to instil [*sic*] within humankind.”<sup>140</sup> The Chamber expanded the scope of what harm demonstrates persecution, stating that the crime of persecution “encompasses not only bodily and mental harm and infringements upon individual

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138. Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶¶ 644, 697 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997).

139. See Gerstenblith, *supra* note 92, at 390.

140. Prosecutor v. Blaskic, *supra* note 69, ¶ 227.

freedom but also acts which appear less serious, such as those targeting property, so long as the victimised persons were specially selected on grounds linked to their belonging to a particular community.”<sup>141</sup>

Similarly, in the *Krajisnik* case, the Trial Chamber recognised that attacks on cultural property affect the rights of a person and have “a severe impact on persons who value that property.”<sup>142</sup> On this basis the Trial Chamber confirmed that the destruction of cultural property is “an underlying act of persecution” and includes the “destruction or damage of an institution dedicated to religion, charity, education, or the arts and sciences, historic monuments and works of art and science, when the perpetrator acted with the intent to destroy or damage that property or in the reckless disregard of the substantial likelihood of the destruction or damage.”<sup>143</sup>

In *Kordić and Čerkez*, the Trial Chamber recognised that attacks on cultural heritage of a religious nature “may amount to an act of persecution” because it is an attack “on the very religious identity of a people.”<sup>144</sup> In addition, it found a wider effect than the immediate individuals harmed, as “all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects;”<sup>145</sup> a conclusion which supported its finding that the act of persecution was a crime against humanity. This conclusion was reinforced in *Jokic*, which found that the destruction of historical locations, such as the Old Town of Dubrovnik, “was an attack not only against the history and heritage of the region, but also against the cultural heritage of humankind.”<sup>146</sup> In addition to the above, the cases against *Naletilic and Martinovic*,<sup>147</sup> *Prlić*,<sup>148</sup>

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141. *Id.* ¶ 233.

142. Prosecutor v. Krajisnik, Case No. IT-00-39-T, Judgment, ¶ 781 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 27, 2006).

143. *Id.* ¶ 782.

144. Prosecutor v. Kordić & Čerkez, Case No. IT-95-14/2-T, Judgment, ¶ 207 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001).

145. *Id.*

146. Prosecutor v. Jokic, Case No. IT-01-42/1-S, Sentencing Judgment, ¶¶ 51, 53 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 18, 2004).

147. See Prosecutor v. Naletilic, Case No. IT-98-34-T, Judgment, ¶¶ 704, 709, 713, 763 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2003).

148. See Prosecutor v. Prlić, Case No. IT-04-74-T, Judgment, Vol. 3 of 6, 22–23, ¶ 178 (Int'l Crim. Trib. for the Former Yugoslavia May 29, 2013).

*Brdanin*<sup>149</sup> and *Milutinović*<sup>150</sup> found that the crime against humanity of persecution was committed by the “destruction or wilful damage done to institutions” of cultural significance to individuals and communities including those “dedicated to religion.”<sup>151</sup>

Although the factual background of each of these cases before the ICTY involved crimes committed during the course of an armed conflict, a clear precedent was set that the destruction of cultural heritage can be applied under international criminal law as a crime against humanity; opening the door for this crime against humanity to be applied to crimes committed during times of peace.

The ICTY’s case law is important to advancing the application of Article 7 of the Rome Statute to instances of cultural heritage destruction. However, each ICTY case charging a crime against humanity of persecution for the destruction of cultural heritage concerns allegations of destruction or damage which took place during an armed conflict. This reality can be attributed to the jurisdictional limit the Statute of the ICTY placed over crimes against humanity. Article 5 of the Statute concerns “crimes when committed in armed conflict, whether international or internal in character.”<sup>152</sup> The ICTY’s inclusion of a ‘war nexus’ as a jurisdictional limit over the definition of crimes against humanity originates in the formulation of crimes against humanity in the Charter of the International Military Tribunal (the Nuremberg Tribunal) in order to rationalize international jurisdiction over these crimes and not with the intention of limiting the definition or scope of the crimes.<sup>153</sup>

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149. See Prosecutor v. Brdanin, Case No. IT-99-36-T, Judgment, ¶ 15(c), 1082 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004).

150. See Prosecutor v. Milutinović, et al., Case No. IT-05-87-T, Judgment, ¶ 206 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009).

151. Prosecutor v. Prlić, *supra* note 148, ¶ 178.

152. ICTY Statute, *supra* note 120, art. 5.

153. See Theodor Meron, Editorial Comment, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT’L L. 78, 85 (1994) (opining that although the Nuremberg Tribunal “did not consider crimes committed before the war to be crimes against humanity, it may have been guided by jurisdictional considerations and not necessarily by a conceptually narrow definition of crimes against humanity.”); Beth Van Schaack, *The Definition of Crimes against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT’L L. 787, 791 (1998) (“[T]he Charter of the International Military Tribunal contained a curious limiting principle: the Nuremberg Tribunal could assert jurisdiction only over those crimes against humanity committed ‘before or

Following the Nuremberg Tribunal, the 'war nexus' was applied to crimes against humanity as a substantive element by "international tribunals, international law drafters and commentators in the post-Nuremberg era [which] were left to follow the Nuremberg precedent in their treatment of the prohibition against crimes against humanity."<sup>154</sup> As noted above, this included the Statute of the ICTY, but it is notable that the Appeals Chamber of the ICTY made clear that the 'war nexus' was merely a jurisdictional limit and not a substantive element of the crime.<sup>155</sup>

Although there is no precedent to date under international criminal law where the crime against humanity of persecution has been applied to events occurring during times of peace, the provisions of the Rome Statute of the ICC on crimes against humanity contain no jurisdictional limits which require a 'war nexus.'<sup>156</sup>

Therefore, this article will examine the requirements under Article 7(1)(h) of the Rome Statute for establishing a crime against humanity of persecution with regard to the events concerning the Dakota Access Pipeline, as well as the destruction of cultural heritage more generally during times of peace.

#### VII. THE ELEMENTS OF THE CRIME AGAINST HUMANITY OF PERSECUTION, AND THE DAKOTA ACCESS PIPELINE

As demonstrated in the case law of the ICTY, the destruction of cultural heritage has been recognised not only as a war crime but also as a crime against humanity of persecution.<sup>157</sup> However, the jurisdictional limits of the Tribunal

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during the war' and 'in execution of or in connection with any crime within the jurisdiction of the Tribunal,' *i.e.*, war crimes or crimes against the peace. This formulation became known as the 'war nexus,' and it is apparent that the Charter's drafters and the Nuremberg Tribunal itself considered the war nexus necessary to justify the extension of international jurisdiction into what would otherwise be acts within the domestic jurisdiction of a state.").

154. Van Schaack, *supra* note 153, at 792.

155. Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶¶ 73–78 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); Van Schaack, *supra* note 153, at 794.

156. Rome Statute, *supra* note 10, art. 7; Darryl Robinson, *Defining "Crimes against Humanity" at the Rome Conference*, 93 AM. J. INT'L L., 43, 45–46 (1999).

157. See § VI, pp. 183–86 *supra*.

and the “war nexus” requirement for crimes against humanity mean that the crime of persecution as a crime against humanity cannot be applied to events occurring during times of peace. Therefore, to analyze the applicability of this crime during times of peace, the provisions of the Rome Statute on crimes against humanity, which were drafted to eliminate jurisdictional limits involving the war nexus requirement, must be examined.

The Rome Statute sets out in Article 7 that a crime against humanity means any of the underlying acts listed in Article 7(1) “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>158</sup> Among the underlying acts listed in Article 7, is the act of persecution under Article 7(1)(h). In order to allege that the destruction of cultural property and heritage is a crime against humanity of persecution, the Rome Statute requires that the contextual elements of a crime against humanity are proven as well as the elements of the underlying act of persecution. In addition, the case law of the ICTY requires an examination of the *actus reus* and *mens rea* of the underlying act of destruction of cultural heritage.<sup>159</sup>

For this analysis, the requirements for the underlying crime of persecution, along with the *actus reus* and *mens rea* for its underlying act of destruction of cultural heritage, will be examined considering the events surrounding the Dakota Access Pipeline, ending with a review of the contextual elements necessary for proving a crime against humanity. In acknowledging that there are allegations of destruction and damage of cultural heritage in many other locations along the pipeline affecting many Native American Tribes, this article will focus on the allegations made by the Standing Rock Sioux Tribe as well as the Cheyenne River Sioux Tribe concerning the sites and objects of cultural and religious heritage which were damaged and destroyed near Cannon Ball, North Dakota.

#### A. THE UNDERLYING CRIME OF PERSECUTION

Article 7(1)(h) establishes the act of “persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . or other grounds that are

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158. Rome Statute, *supra* note 10, art. 7.

159. Prosecutor v. Milutinović, Case No. IT-05-87-T, Judgment, ¶ 206 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009).



universally recognized as impermissible under international law” as an underlying crime to an Article 7 crime against humanity, and specifies that it must be committed “in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.”<sup>160</sup> Article 7(2)(g) goes on to define persecution as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”<sup>161</sup>

The ICC’s document “Elements of Crimes” sets out the required elements for the “crime against humanity of persecution”.<sup>162</sup> As the fifth and sixth element listed in the document relate to the contextual elements for crimes against humanity, it is the first four elements listed in the Elements of Crimes which set out the elements for the crime of persecution.<sup>163</sup> The Elements of Crimes requires the following four elements for an act to constitute a crime against humanity of persecution under article 7(1)(h) of the Rome Statute:

1. The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.
2. The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.
3. Such targeting was based on political, racial, national, ethnic, cultural, religious, gender as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.
4. The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court.<sup>164</sup>

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160. Rome Statute, *supra* note 10, art. 7(1)(h).

161. *Id.* art. 7(2)(g).

162. ICC, ELEMENTS OF CRIMES, *supra* note 18, art. 7(1)(h).

163. *Id.*

164. *Id.*

1. The underlying conduct of destroying or damaging cultural heritage and property

It is notable that the Rome Statute nowhere mentions that the crime of persecution includes the act of destroying cultural heritage or property.<sup>165</sup> By contrast, the case law of the ICTY found that the act of destruction itself must first be established; that in order to address acts of destruction of cultural heritage as a crime against humanity of persecution, “the *actus reus* and *mens rea*” must be established for the underlying act of “wanton destruction or damage of religious sites and cultural monuments, as a form of persecution, a crime against humanity.”<sup>166</sup>

The ICTY Trial Chamber in the *Milutinović* case set out the requirements for establishing the *actus reus* for the underlying offence of destruction of cultural property and heritage as follows: “(a) the religious or cultural property must be destroyed or damaged extensively; (b) the religious or cultural property must not be used for a military purpose at the time of the act; and (c) the destruction or damage must be the result of an act directed against this property.”<sup>167</sup>

In setting out these *actus reus* elements, the Trial Chamber in *Milutinović* further defined the terms “destruction” and “damage.” While both “destruction” and “damage” “must be extensive,” the term destruction “signifie[s] demolition or reduction to a useless form,” and the term damage “refers to physical injury or harm to an object that impairs its usefulness or value.”<sup>168</sup>

These definitions assist with analysing the first element in *Milutinović* for the underlying offence of destruction of cultural property and heritage. The *Milutinović* court noted how these sites were extensively destroyed and damaged, such that they were rendered useless, and that they had lost their cultural value<sup>169</sup> due to the grading conducted by construction crews in order to make an access road to the pipeline.<sup>170</sup> Expert testimony

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165. Sebastián Green Martínez, *Destruction of Cultural Heritage in North Mali: A Crime Against Humanity?*, 13 J. INT’L CRIM. JUST. 1073, 1079 (2015).

166. Prosecutor v. Milutinović, Case No. IT-05-87-T, Judgment, ¶ 206 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009).

167. *Id.*

168. *Id.* ¶ 207.

169. *Id.* ¶ 20.

170. See, e.g., Mentz Declaration of Sept. 4, 2016, *supra* note 24.

set out the extent of the damages which construction companies caused to these sites due to the fact that most were located at or near the surface of the ground, and would therefore be critically affected by grading of the ground's surface. The culturally-significant stone structures and cairns identified and then damaged and destroyed, were located on the ground's surface, and were therefore destroyed by the construction work on September 3, 2016.<sup>171</sup> The location also had a high concentration of grave sites to the Tribes' ancestors and of important chiefs, many of which were located at or near the surface, with cairns placed on top of the graves. The Standing Rock Sioux Tribe highlighted the extent of construction crews' damage to these culturally-significant burial sites by petitioning to halt all construction in the days following the grading process, so that they could collect and rebury the human remains which the crews had displaced and scattered.<sup>172</sup> Testimony from Tribe members and cultural experts noted that the damage was extensive enough to be described as "irreparable."<sup>173</sup>

As to the second element on whether the property had the status of a civilian versus a military object, the ICTY's jurisdictional limitation requiring a 'war nexus' for crimes against humanity comes to mind,<sup>174</sup> as well as the importance under international humanitarian law principles of ascertaining the legality of an attack based on a target's status as a military object.<sup>175</sup> Given that the nexus to an armed conflict is not required before the ICC, and analysis at issue under Article 7 is for an event taking place in times of peace, it is unclear how the ICC would consider this element under *Milutinović*. Nevertheless, it is clear in the case of destruction of cultural heritage near Cannon Ball, North Dakota that the cultural and religious objects destroyed were not military objects, nor were they used for any military purpose.

Last, the cultural heritage and property located in the area near Canon Ball, North Dakota and along the path of the pipeline were the ancestral "gravesites and culturally important stone features," such as stone structures, effigies and cairns "in and adjacent to the right of way" of the pipeline, all of which

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171. *Id.* ¶ 8.

172. *Id.* ¶ 9.

173. Mentz Declaration of Aug. 11, 2016, *supra* note 36, ¶ 19.

174. Van Schaack, *supra* note 153, at 792.

175. *See, e.g.*, First Protocol, *supra* note 77, art. 52.

were destroyed on September 3, 2016.<sup>176</sup> Given the notification of the presence of objects of cultural heritage before the area was graded for construction,<sup>177</sup> it can be argued those responsible for construction on the land had notice that grading the land would destroy these objects. With this knowledge, it can be said that the actions of construction were an “act directed against” the cultural property and heritage of the Tribes.

Therefore, I argue that the act of destroying or damaging cultural heritage or property, as underlying conduct to the crime against humanity of persecution, in the case of the cultural heritage and property near Cannon Ball, is present. The construction companies took actions directed against the land, which they knew would damage objects of cultural heritage that were not military objects. Further, the crews did in fact destroy or damage these sites and objects to an irreparable state which impaired their cultural and religious value.

## 2. The intent to destroy or damage cultural heritage and property

As for the required *mens rea* at the ICC for the act of destroying cultural heritage and property, Article 30 of the Rome Statute sets out that “a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.”<sup>178</sup> Article 30 defines ‘intent’ as “mean[ing] to engage in the conduct” and being aware that the consequence “will occur in the ordinary course of events.”<sup>179</sup> While ‘knowledge’ is defined as “awareness that a circumstance exists or a consequence will occur in the ordinary course of events.”<sup>180</sup>

It is notable that for the ICC’s first case considering the war crime of destruction of cultural heritage under Article 8(2)(e)(iv), the Trial Chamber found that the “specific intent of the defendant to attack protected objects” was the required *mens rea* for Article 8(2)(e)(iv).<sup>181</sup> For the purpose of holding attacks on

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176. Complaint of July 27, 2016, *supra* note 26, ¶¶ 76, 78; *see also, e.g.*, Mentz Declaration of Sept. 4, 2016, *supra* note 24.

177. *See, e.g.*, Eagle Declaration of Aug. 4, 2016, *supra* note 23, ¶ 12.

178. Rome Statute, *supra* note 10, art. 30(1).

179. Rome Statute, *supra* note 10, art. 30(2).

180. Rome Statute, *supra* note 10, art. 30(3).

181. Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15-171, Judgment and

cultural heritage as a crime against humanity of persecution under Article 7(1)(h), the requirements of Article 30, and the *mens rea* requirement for destruction of property in Al-Mahdi are informative. For the crime against humanity of persecution, a “high threshold of intention” is required to show “intentional and severe deprivation of fundamental rights contrary to international law.”<sup>182</sup>

Further, the case law of the ICTY provides guidance on the required *actus reus* for destruction or damage to cultural heritage or property as a crime against humanity.<sup>183</sup> Jurisprudence from the *Milutinović* and *Krajisnik* cases apply a standard which broadly holds individuals responsible not only if their actions are committed with the specific intent to deprive a group or collectivity of fundamental rights, but also if the perpetrator’s actions are committed with knowledge that the actions would cause harm and were taken, nevertheless, with reckless disregard.<sup>184</sup> The Trial Chambers in the *Milutinović* and *Krajisnik* cases explained that the “mens rea required for the offence is that the physical perpetrator, intermediary perpetrator, or accused acted with the intent to destroy or extensively damage the property in question, or in reckless disregard of the likelihood of its destruction or damage.”<sup>185</sup>

Commentary on the ‘intentionality element’ of the destruction of cultural heritage has noted that, under the Rome Statute, this element “needs to be understood in light of a standard of reckless disregard or willful negligence for the consequences of an attack that is likely to cause collateral damage to cultural heritage.”<sup>186</sup> Likewise, the UNESCO Declaration of 2003 also supports the proposition that the intent

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Sentence, ¶ 12 (Sept. 27, 2016).

182. Valerie Oosterveld, *Gender, Persecution, and the International Criminal Court: Refugee Law’s Relevance to the Crime Against Humanity of Gender-Based Persecution*, 17 DUKE J. COMP. & INT’L L. 49, 57 (2006).

183. *Id.* at 59.

184. See *Mali Article 53(1) Report*, *supra* note 14, ¶ 127 (establishing that for a crime against humanity, the contextual elements which must be proven include “(v) the accused’s knowledge of the attack”).

185. Prosecutor v. Milutinović, Case No. IT-05-87-T, Judgment, ¶ 206 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009); Prosecutor v. Krajisnik, Case No. IT-00-39-T, Judgment, ¶ 782 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 27, 2006) (finding the destruction of cultural property is “[A]n underlying act of persecution . . . when the perpetrator acted with the intent to destroy or damage that property or in the reckless disregard of the substantial likelihood of the destruction or damage.”).

186. Gerstenblith, *supra* note 92, at 390.

requirement should consider both specific intent and reckless disregard on the part of the perpetrator.<sup>187</sup> Although the UNESCO Declaration addresses the standard of intent for States which are responsible for acts of destruction, and not the standard on the level of individual criminal responsibility, it provides that a State which “intentionally destroys or intentionally fails to take appropriate measures to prohibit, prevent, stop, and punish any intentional destruction of cultural heritage of great importance for humanity . . . bears the responsibility for such destruction.”<sup>188</sup> This is further supported by UN Security Council Resolution 2199, which addresses both the “incidental or deliberate” destruction of cultural property.<sup>189</sup>

In the case of the pipeline, those responsible for construction of the pipeline had been notified of the presence of the cultural heritage on the areas meant for construction, and of the likelihood that construction would irreparably damage and destroy these sites, through legal submissions and expert declarations which documented that ancestral graves, stone rings, cairns, effigies and other culturally significant sites were either in the direct path of the pipeline, or in close vicinity.<sup>190</sup> The submissions and evidence specifically noted that “[c]onstruction of the pipeline, which includes clearing and grading a 100–150 foot access pathway nearly 1200 miles long, digging a trench as deep as 10 feet, and building and burying the pipeline, would destroy burial grounds, sacred sites, and historically significant areas on either side of Lake Oahe.”<sup>191</sup> The cultural and religious significance of these sites to the Tribes was also made clear.<sup>192</sup> It was submitted that construction would “without a doubt” destroy these historical and cultural sites.<sup>193</sup>

Despite the legal and expert submissions submitted and efforts for injunctive relief warning of the sites’ vulnerability to damage and destruction due to their location at or near the ground’s surface, construction crews commenced grading operations in September 2016, resulting in the damage and destruction of gravesites, as well as stone structures, cairns and

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187. 2003 UNESCO Declaration, *supra* note 93, pt. VI.

188. *Id.*

189. S.C. Res. 2199, *supra* note 97, ¶ 15.

190. Eagle Declaration of Aug. 4, 2016, *supra* note 23, ¶ 12.

191. Complaint of July 27, 2016, *supra* note 26, ¶ 76; Mentz Declaration of Sept. 2, 2016, *supra* note 30, ¶¶ 1–4.

192. Eagle Declaration of Aug. 4, 2016, *supra* note 23, ¶ 12.

193. Mentz Declaration of Aug. 11, 2016, *supra* note 36, ¶ 35.

stone rings. The fact that the corporations involved with construction proceeded despite notification through legal proceedings of the presence of cultural heritage on the locations of potential construction, demonstrates an intent to take action with knowledge of the likelihood that the actions would result in the destruction and damage of these sites. It could be asserted that those responsible for the construction of the pipeline specifically intended to destroy the cultural heritage by moving forward with construction on the site, but a more likely argument is that these actions were taken with full knowledge, and reckless disregard, of the consequences of the actions. Therefore, I argue that the required *mens rea*, which would be applied to the crime against humanity of persecution for destroying cultural heritage, has been met.

3. The group or collectivity was targeted based on political, racial, national, ethnic, cultural, religious, gender or other grounds.

Carrying on from the analysis of intent, the Elements of Crimes requires that an act of persecution demonstrate that the group or collectivity whose cultural heritage was destroyed was targeted on the basis of political, racial, national, ethnic, cultural, religious, gender or other grounds.<sup>194</sup> In addition to establishing that the group attacked belongs to a group with a political, racial, national, ethnic, cultural, religious, or gender identity, courts also link this consideration to the issue of intent, as the element calls for evidence that the population was targeted based on a number of grounds relating to the identity of the group. In essence, it is asking for a showing that the attack was driven by an intention based on the identity of the group.

In the events concerning the Dakota Access Pipeline, the identity of the “group or collectivity” attacked is clear. The cultural heritage destroyed was significant to the people of the Standing Rock Sioux Tribe, in particular, and also to the Cheyenne River Sioux Tribe. The sites of cultural heritage damaged and destroyed near Canon Ball, North Dakota on September 3, 2016 were located just north of the Standing Rock reservation,<sup>195</sup> and the reservation is home to about half of the Standing Rock Sioux Tribe’s members; meaning that about

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194. ICC, ELEMENTS OF CRIMES, *supra* note 18, art. 7(1)(h).

195. Mentz Declaration of Sept. 2, 2016, *supra* note 30, ¶ 12.

9,000 members of the Tribe live on the reservation and look to these sites in and around the reservation as part of their culture, religion, and heritage.<sup>196</sup>

As for the issue of the perpetrator's intent to target a "group or collectivity," case law before the ICTY has established that the crime of persecution "requires evidence of a specific intent to discriminate on political, racial, or religious grounds and that it falls to the Prosecution to prove that the relevant acts were committed with the requisite discriminatory intent."<sup>197</sup> The ICTY Appeals Chamber in *Dordevic* confirmed that although the "requisite discriminatory intent cannot be inferred directly from the general discriminatory nature of an attack characterised as a crime against humanity, however, it 'may be inferred from such a context of the attack so long as, in view of the facts of the case, circumstances surrounding the commission of the alleged acts substantiate the existence of such intent.'"<sup>198</sup> The Appeals Chamber clarified that circumstances which may be taken into consideration include "the general attitude of the alleged perpetrator of the offence as seen through his or her behaviour."<sup>199</sup> The Appeals Chamber also noted that the perpetrator's "personal motive does not preclude a perpetrator from also having the requisite specific intent," explaining that the perpetrator might have a separate motivation for the action, "but at the same time also possess the intent to discriminate against his or her victim on political, racial, or religious grounds."<sup>200</sup>

The fact that the ICTY found that "[i]t is not sufficient for the accused to be aware that he or she is in fact acting in a way that is discriminatory,"<sup>201</sup> but that the perpetrator must "consciously intend to discriminate,"<sup>202</sup> is a hurdle to overcome in proving that the destruction of cultural heritage as a result of the pipeline's construction is an act of persecution. What is

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196. Archambault Declaration of Aug. 3, 2016, *supra* note 25, ¶ 2.

197. Prosecutor v. Dordević, Case No. IT-05-87/1-A, Judgment, ¶ 876 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 27, 2014) (quoting Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, ¶ 184 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 17, 2003)).

198. *Id.* (quoting Prosecutor v. Dordević, Case No. IT-05-87/1-T, Judgment, ¶¶ 1759–60 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 23, 2011)).

199. *Id.*

200. *Id.* ¶ 887.

201. Prosecutor v. Dordević, Case No. IT-05-87/1-T, Judgment, ¶ 1759 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 23, 2011).

202. *Id.*



helpful to the analysis concerning the Dakota Access Pipeline is that, although it would be argued that the corporation officials' actions were motivated by economic development to construct the pipeline and not to persecute the tribes affected, the ICTY has found that such motive does not bar a finding that the corporation officials "at the same time also possess the intent to discriminate" on the grounds of race, religion, cultural or other grounds.<sup>203</sup>

In the case of the Dakota Access Pipeline, arguments could be made that the original routing of the pipeline demonstrates this intent to discriminate, as the original route passed north of Bismarck, North Dakota, and not by the Standing Rock reservation. Plaintiffs allege that the route was amended to pass near the reservation after surveys of the route, and residents of Bismarck, raised concerns about how it would affect the water supply for residents of Bismarck,<sup>204</sup> and on the risk of oil spill from the pipeline.<sup>205</sup> As a result of this amendment, there have been accusations that the change was made on the basis of race. It is alleged that the "risk [was] placed squarely on the Tribe,"<sup>206</sup> and demonstrates discriminatory actions by the corporations which own the pipeline and are constructing it.<sup>207</sup>

Based on these allegations and facts I argue that specific discriminatory intent is present, and that it has been demonstrated that the Sioux Tribes, whose cultural heritage was damaged and destroyed, were targeted with discriminatory intent because the route of the pipeline was specifically planned to affect an area sacred to the Tribe, and therefore on the bases of race, ethnicity, cultural and religion, instead of affecting the

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203. Prosecutor v. Dordević, *supra* note 201, ¶ 887.

204. Dakota Access, LLC, *Combined Application of Dakota Access LLC for a Waiver or Reduction of Procedures and Time Schedules and for a Corridor Certificate and Route Permit*, (Dec. 2014), <https://psc.nd.gov/database/documents/14-0842/001-030.pdf>; see also Amy Dalrymple, *Pipeline Route Plan First Called for Crossing North of Bismarck*, BISMARCK TRIB. (Aug. 18, 2016), [https://bismarcktribune.com/news/state-and-regional/pipeline-route-plan-rst-called-for-crossing-north-of-bismarck/article\\_64d053e4-8a1a-5198-a1dd-498d386c933c.html](https://bismarcktribune.com/news/state-and-regional/pipeline-route-plan-rst-called-for-crossing-north-of-bismarck/article_64d053e4-8a1a-5198-a1dd-498d386c933c.html); Catherine Thorbecke, *Why a Previously Proposed Route for the Dakota Access Pipeline Was Rejected*, ABC NEWS (Nov. 3, 2016), <https://abcnews.go.com/US/previously-proposed-route-dakota-access-pipeline-rejected/story?id=43274356>.

205. Archambault Declaration of Feb. 9, 2017, *supra* note 37, ¶ 20.

206. *Id.*

207. Andrew Buncombe, *North Dakota Pipeline: How it Favours White Community over Native Neighbours—In One Map*, INDEPENDENT (Nov. 30, 2016), <https://www.independent.co.uk/news/world/americas/north-dakota-access-pipeline-protests-map-white-indigenous-latest-a7448161.html>.

land of the populations in Bismarck.

#### 4. The deprivation of a fundamental human right

It is significant that the UNESCO Declaration of 2003 acknowledges that, although the intent may be for the destruction of cultural property or heritage, an integral reality of this act is that “intentional destruction of cultural heritage constitutes a violation of human rights and may be accompanied by other grave human rights violations.”<sup>208</sup> This is noted in the Declaration’s definition of “intentional destruction” which defines it as “an act intended to destroy in whole or in part cultural heritage, thus compromising its integrity, in a manner which constitutes a violation of international law or an unjustifiable offence to the principles of humanity and dictates of public conscience.”<sup>209</sup> The definition recognizes that an intentional act against property or heritage cannot be separated from its link to human rights.

To this, the first element of the underlying crime of persecution listed in the Elements of Crimes requires that a person or group of people are deprived of a fundamental human right under international law. This element identifies the first main hurdle to recognizing the destruction of cultural heritage as a crime against humanity instead of a war crime. As the contextual elements require, and as discussed throughout this article, a crime against humanity must be against persons—“against any civilian population”<sup>210</sup>—and not against property. Recognizing the destruction of cultural heritage as a crime against persons is a departure from the original construction of protections to cultural property under customary international law which viewed property, or the state in which the object was located, as the object of protection, and not individuals affected by the harm to the cultural site.<sup>211</sup> But, as discussed above,<sup>212</sup> the protection of cultural heritage has developed so that “[i]nternational norms relating to cultural heritage consider the

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208. Al-Mahdi Report of Bennoune, *supra* note 83, at 12.

209. 2003 UNESCO Declaration, *supra* note 93, pt. II.

210. Rome Statute, *supra* note 10, art. 7.

211. BIICL REPORT, *supra* note 59, at 5 (providing protection within international instruments was initially “envisaged as protection of state sovereignty over the property that was at stake” but eventually moved its focus to “the cultural property as the object of protection”).

212. See, e.g., *supra* pp. 168–79.

destruction of any nation's cultural property as a loss and an injury to the collective heritage of humankind's civilization" and "as a matter of public interest, and not only as part of private property rights."<sup>213</sup> The destruction of cultural heritage is, thus, not only a violation of the customary international law aimed at "preserving and safeguarding an object,"<sup>214</sup> but is also a violation of guaranteed human rights for the individuals affected and "is a necessary and complementary approach to the preservation/safeguard of cultural heritage."<sup>215</sup>

In 2016 the Report of the Special Rapporteur in the Field of Cultural Rights emphasized the importance of cultural heritage from a human rights perspective,<sup>216</sup> stating that:

Cultural heritage is significant in the present, both as a message from the past and as a pathway to the future. Viewed from a human rights perspective, it is important not only in itself, but also in relation to its human dimension, in particular its significance for individuals and groups and their identity and development processes. Cultural heritage is to be understood as the resources enabling the cultural identification and development processes of individuals and groups, which they, implicitly or explicitly, wish to transmit to future generations.<sup>217</sup>

Viewing the protection of cultural heritage from the perspective that the object of protection includes individual people and groups, highlights that the protection of cultural heritage is an extension of international human rights law.<sup>218</sup> Human rights law protects certain fundamental human rights and the "intentional destruction [of cultural heritage] . . . [has]

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213. Francioni & Lenzerini, *supra* note 82, at 638; Gerstenblith, *supra* note 92, at 392 ("Cultural heritage destruction constitutes a crime against people, not simply a loss of property.").

214. Al-Mahdi Report of Bennoune, *supra* note 83, at 13.

215. Farida Shaheed, *Report of the Independent Expert in the Field of Cultural Rights*, ¶ 2, U.N. Doc. A/HRC/17/38 (Mar. 21, 2011).

216. *See, e.g.*, Karima Bennoune (Special Rapporteur in the Field of Cultural Rights), *Report of the Special Rapporteur in the Field of Cultural Rights*, U.N. Doc. A/HRC/31/59 (Feb. 3, 2016).

217. *Id.* ¶ 47; *see also* Al-Mahdi Report of Bennoune, *supra* note 83, at 4.

218. Farida Shaheed, *supra* note 215, ¶¶ 77–79; Karima Bennoune, *supra* note 216, ¶ 51.

adverse consequences on . . . human rights.”<sup>219</sup> I review fundamental rights of individuals protected under international human rights law, which are affected by acts against cultural heritage, below.

When examining the human rights which the international community has recognized through international human rights documents, the most relevant right is the human right of people to their own culture. This right is set out in human rights instruments including Article 27 of the Universal Declaration of Human Rights, which guarantees the right “to participate in the cultural life of the community,”<sup>220</sup> and Article 27 of the International Covenant on Civil and Political Rights which notes the right to “enjoy [one’s] own culture” in relation to the rights of “ethnic, religious or linguistic minorities.”<sup>221</sup> Article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), also specifically notes an individual’s right to cultural heritage. This provision “recognize[s] the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”<sup>222</sup>

In a General Comment on Article 15 of the ICESCR, the Committee on Economic, Social and Cultural Rights explained that this right creates an obligation for State parties to respect, protect and fulfil the right “to have access to their own cultural and linguistic heritage and to that of others,”<sup>223</sup> but also creates

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219. See, e.g., 2003 UNESCO Declaration, *supra* note 93, at 62.

220. G.A. Res. 217A (III), Universal Declaration of Human Rights, art. 27(1) (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights] (“Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”).

221. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 27 (Dec. 16, 1966) [hereinafter International Covenant on Civil and Political Rights] (“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”).

222. G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, art. 15 (Dec. 16, 1966) [hereinafter International Covenant on Economic, Social and Cultural Rights].

223. Comm. on Econ., Social and Cultural Rights, General Comment No. 21, Right of Everyone to Take Part in Cultural Life (art. 15, ¶ 1(a), of the International Covenant on Economic, Social and Cultural Rights), ¶ 49(d), U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009) [hereinafter CESCR General Comment No.

an obligation “requiring States to take measures to prevent third parties from interfering” with this right.<sup>224</sup>

It is evident that when sites of great significance to a population’s cultural heritage are extensively damaged or destroyed, the population will be denied the right to access their culture or to take part in their culture. For the Tribes affected by the construction of the Dakota Access Pipeline—specifically those affected by the construction and grading which occurred on the land near Canon Ball on September 3, 2016—the effects included the loss of a stone structure used for religious worship and spiritual guidance as well as the destruction of grave sites of the Tribe’s ancestors.

As noted above, stone structures are important to the Tribes’ culture and religion as a place where individuals find “spiritual connection through prayer and commitment at these stone features,”<sup>225</sup> and are evidence of a “highly structured spiritual walk of life practice by” the members of the Standing Rock Sioux Tribe.<sup>226</sup> Their destruction would deprive the people of the Tribe the ability to practice these rituals, and would therefore constitute a clear violation of the right to access, and take part in, one’s culture.<sup>227</sup> Likewise, the way in which a group of people honors and grieves its dead is a highly cultural and religious practice. For the Standing Rock Sioux Tribe, some members were buried at the site of the stone structure where they worshipped throughout their lives, and burial grounds were often located towards the surface of the ground with rock cairns placed on top.<sup>228</sup> The fact that a number of the grave sites were of important chiefs to the Tribes further touches on the Tribes’ protection of its cultural heritage.<sup>229</sup>

After the land near Canon Ball was affected by grading on September 3, 2016, it was submitted that any site “that was in

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224. *Id.* ¶ 50.

225. Mentz Declaration of Aug. 11, 2016, *supra* note 36, ¶ 12.

226. *Id.* ¶ 11.

227. *E.g., id.* ¶¶ 18–19 (“Today for the Lakota/Dakota, it is rare to find individuals who have reached an important level of spiritual achievement because they are denied access to their family or society sacred sites . . . when any type of development or project destroys a sacred stone ring . . . it inadvertently destroys the power of any sacred bundle connected to that place . . .”).

228. *Id.* ¶ 16.

229. *See, e.g.,* Memorandum of Sept. 4, 2016, *supra* note 28, at 3, 6.

the pipeline corridor [was] destroyed.”<sup>230</sup> It was reported that grave sites were significantly disturbed, and the Tribe requested permission to visit the site of grading to “look for human remains” and “rebury relatives.”<sup>231</sup> The destruction to these stone structures and grave sites is a deprivation of the Tribe members’ right to practice and access their culture.

In addition, the Committee’s commentary on a State’s duty to protect the right to cultural heritage under Article 15 is of further importance to the examination of the events concerning the Dakota Access Pipeline. The Committee explained that a State’s obligation to prevent third parties from interfering in the right to cultural life includes the obligation for States and third parties to respect and protect the cultural heritage of marginalised groups and indigenous peoples against economic development and corporations.<sup>232</sup> General Comment 21 explains that there is an obligation to:

(b) Respect and protect cultural heritage of all groups and communities, in particular the most disadvantaged and marginalized individuals and groups, in economic development and environmental policies and programmes;

Particular attention should be paid to the adverse consequences of globalization, undue privatization of goods and services, and deregulation on the right to participate in cultural life.

(c) Respect and protect the cultural productions of indigenous peoples, including their traditional knowledge, natural medicines, folklore, rituals and other forms of expression;

This includes protection from illegal or unjust exploitation of their lands, territories and resources by State entities or private or transnational enterprises and corporations.<sup>233</sup>

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230. Mentz Declaration of Sept. 4, 2016, *supra* note 24, ¶ 5.

231. *Id.* ¶ 8.

232. CESCR General Comment No. 21, *supra* note 223, ¶ 50(b)(c).

233. *Id.*

These provisions are particularly relevant to the Dakota Access Pipeline, and set out that the United States has an obligation to protect the “cultural productions” of the Tribes such as the Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribe, against “unjust exploitation of their lands, territories and resources by State entities or private or transnational enterprises and corporations.”<sup>234</sup> In this case, the right of these “indigenous peoples” to access and take part in their culture was not protected, and therefore was violated.

The destruction of cultural heritage is also a violation to the right to religion.<sup>235</sup> Human rights instruments such as the International Covenant on Civil and Political Rights,<sup>236</sup> European Convention on Human Rights,<sup>237</sup> American Convention on Human Rights,<sup>238</sup> African Charter on Human and Peoples’ Rights,<sup>239</sup> and Universal Declaration of Human Rights<sup>240</sup> all include the right to freedom of thought, conscience and religion and to manifest one’s religion or belief in worship, teaching, practice or observation<sup>241</sup> for all populations including minority populations.<sup>242</sup> The destruction of cultural heritage or property of importance to a population’s religious practice represents a violation of this right because the cultural heritage “constitutes a representation of both a religious belief and of the cultural identity of a people.”<sup>243</sup> When cultural heritage or property of a religious nature such as churches, shrines, temples, or other sites used in the worship of a population, are destroyed,

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234. *Id.*

235. Karima Bennoune, *supra* note 216, ¶ 51.

236. International Covenant on Civil and Political Rights, *supra* note 221, art. 18(1).

237. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 9(1), Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 222.

238. Organization of American States, American Convention on Human Rights art. 12(1), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

239. African (Banjul) Charter on Human and Peoples’ Rights art. 8, June 27, 1981, 21 I.L.M 58.

240. Universal Declaration of Human Rights, *supra* note 220, art. 18.

241. *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 237, art. 9(1) (“Everyone has the right to freedom of thought, conscience and religion; . . . [and] to manifest his religion or belief, in worship, teaching, practice and observance.”).

242. International Covenant on Civil and Political Rights, *supra* note 221, art. 27 (“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”).

243. Francioni & Lenzerini, *supra* note 82, at 638.

this removes the population's ability to practice its right to religion.<sup>244</sup>

The destruction of stone structures important to the Standing Rock Sioux Tribe is an example of the destruction of religious sites which violates the Tribe members' ability to practice their spiritual and religious beliefs. This is because the stone structures are closely tied to the Tribe members' "spiritual walk of life practice".<sup>245</sup> When these sites are damaged or destroyed "it destroys the spiritual connection" these individuals have to the sites and therefore to their religious and spiritual practice.<sup>246</sup> Therefore, the destruction of stone structures near Canon Ball deprives the people of the Standing Rock Sioux Tribe of not only their place of worship but also of their ability to practice.

Likewise, the human right to self-determination could also be violated by the destruction of cultural heritage. The right to self-determination is established in such international human rights instruments as the International Covenant of Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights.<sup>247</sup> Cultural heritage has been recognized by the International Criminal Court as playing "a central role in the way communities define themselves and bond together, and how they identify with their past and contemplate their future."<sup>248</sup> With cultural heritage constituting a central part in how an individual decides to lead his or her life, its destruction "represents an irreplaceable loss"<sup>249</sup> to an individual's ability to determine certain aspects of how they will lead their life, making its destruction a violation of an individual's right to self-determination. This is true for the communities' right as a whole to determine and express its identity as well.

Much like the deprivation of the right to religion, the loss of sites and objects which are critical to the practice of the historical, religious and cultural heritage, prevent individuals, and the larger community, of the ability to decide for themselves

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244. *Id.*

245. Mentz Declaration of Aug. 11, 2016, *supra* note 36.

246. *Id.* ¶ 41.

247. International Covenant on Economic, Social and Cultural Rights, *supra* note 222, art. 1(1); International Covenant on Civil and Political Rights, *supra* note 221, art. 1(1).

248. Al-Mahdi Reparations Order, *supra* note 52, ¶ 14.

249. Al-Mahdi Report of Lostal, *supra* note 85, ¶ 45.



how they will follow these traditions and spiritual practices. For example, as stone structures are the necessary 'portal' to make a spiritual connection through prayer, their destruction would deprive individuals of the ability to practice this structured spiritual practice.<sup>250</sup> This destruction or damage would therefore constitute a violation of the right to self-determination.

The destruction of cultural heritage could be considered a violation of the right to education depending on the nature of the site destroyed. The right to education is enshrined in human rights instruments such as the International Covenant of Economic, Social and Cultural Rights, European Convention on Human Rights, and African Charter on Human and Peoples' Rights.<sup>251</sup> If the destroyed cultural heritage site was in a library or a place of religious or cultural teaching, then this act would impair or remove the ability to learn and would thus constitute a violation of the right to education.<sup>252</sup>

For the Tribes whose cultural heritage was affected by the Dakota Access Pipeline, it is recognized that these sites are of cultural importance, but also of "historical significance," noting that their destruction severs the "connection to [the Tribe members'] history."<sup>253</sup> As highlighted by the ICC, the loss of such sites "deprive a community of its . . . memory, as well as the physical testimony of its past," and removes the ability to "transmit its values and knowledge to future generations."<sup>254</sup> Therefore, it could be argued that destruction and damage to these sites of historical significance deprive Tribe members of the ability to learn about the history of their culture.

Last, it has been recognized that the protection of cultural heritage and property "cannot be separated from the protection of human life;"<sup>255</sup> highlighting the guarantee under international human rights law to the right to life. The

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250. Mentz Declaration of Aug. 11, 2016, *supra* note 36, ¶ 11.

251. African (Banjul) Charter on Human and Peoples' Rights, *supra* note 239, art. 17(1); International Covenant on Economic, Social and Cultural Rights, *supra* note 221, art. 13; European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 237, art. 2.

252. The classification of institutions dedicated to education has been recognized as cultural property. *See, e.g.*, ICTY Statute, *supra* note 120, art. 3(d); 1907 Hague Convention, *supra* note 60, ¶ 27; M. Adatci, *supra* note 63, at 115.

253. Archambault Declaration of Aug. 3, 2016, *supra* note 25, ¶ 15.

254. Al-Mahdi Reparations Order, *supra* note 52, ¶¶ 14, 22.

255. Prosecutor v. Al-Mahdi, Case No. ICC-01/12-01/15-194, UNESCO Amicus Curiae Observation Submitted Pursuant to Rule 103 of the Rules of Procedure and Evidence, ¶ 2 (Dec. 2, 2016).

fundamental right to life is established in such international human rights instruments as the ICCPR, Universal Declaration of Human Rights, European Convention on Human Rights, African Charter on Human and Peoples' Rights and American Convention on Human Rights.<sup>256</sup>

The destruction of cultural heritage or property has been extensively linked to human life with commentary that “cultural heritage enables us to identify ourselves as ‘humankind’” and finding that “cultural heritage is essential to the life of the human being.”<sup>257</sup> If cultural heritage is recognized as the “connection to what makes us men and women” and “that which makes us human,”<sup>258</sup> and is essential to transmitting these “values and knowledge to future generations,”<sup>259</sup> then there could be an argument that its destruction is a violation to these fundamental human rights. This conclusion was noted in Judge Cançado Trindade’s separate opinion in the case of *Cambodia v. Thailand* before the International Court of Justice (ICJ).<sup>260</sup> The separate opinion noted that the Court took into “account not only the territory at issue, but, jointly, the people on territory” in regards to the subject of the Temple of Preah Veihear and in doing so “encompassed the human right[] to life” in its decision and consideration.<sup>261</sup>

The argument is tested by findings in the ICJ Genocide case of *Bosnia-Herzegovina v. Serbia* which concluded that the destruction of cultural heritage on its own does not fit within the definition of genocide under international criminal law. In this case, it was argued that “destruction of historical, cultural and religious heritage in Bosnia and Herzegovina” was “an essential part of the policy of ethnic purification” and was “an attempt to wipe out the traces of [the] very existence” of the Bosnian Muslims.<sup>262</sup> While the Court found that such an act did not fall

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256. African (Banjul) Charter on Human and Peoples' Rights, *supra* note 239, art. 4; American Convention on Human Rights, *supra* note 238, art. 4; International Covenant on Civil and Political Rights, *supra* note 221, art. 6; European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 237, art. 2.

257. Al-Mahdi Report of Lostal, *supra* note 85, ¶ 47.

258. *Id.* ¶ 48.

259. *Id.* ¶ 44; see Al-Mahdi UNESCO Amicus Curiae Observation, *supra* note 255, ¶ 2 (“protecting culture is a core value of the international community that cannot be separated from the protection of human life”).

260. *Cambodia v. Thailand*, Separate Opinion of Judge Cançado Trindade, 2013 I.C.J. 28, ¶¶ 31–33 (Nov. 11, 2013).

261. *Id.*

262. Application of Convention on Prevention and Punishment of Crime of

under the legal definition of genocide as “the definition of acts of genocide is limited to those seeking the physical or biological destruction of a group,” it did find that “such destruction may be highly significant inasmuch as it is directed to the elimination of all traces of the cultural or religious presence of a group”<sup>263</sup> and endorsed the ICTY’s finding in the *Krstić* case which stated that “where there is physical or biological destruction there are often simultaneous attacks on the cultural and religious property and symbols of the targeted group as well, attacks which may legitimately be considered as evidence of an intent to physically destroy the group.”<sup>264</sup> Therefore, while jurisprudence from the ICJ excludes an argument that the destruction of cultural heritage rise to the level of proving an international crime against a human life under international criminal law, there is still the possibility of an argument that such acts fit under international human rights norms.

It is recognized that applying human rights principles of the right to life to events where a human’s physical life has not been harmed is a difficult argument to make and prove. Here, viewing the destruction of significant sites of cultural heritage as a violation of the right to life of these Tribe members is an argument on what defines life, and whether life also includes the things that make us human.<sup>265</sup> It pushes the envelope to a more progressive approach to the interpretation of the right to life, but in this way could support the development of the protection of cultural heritage in terms of its human dimension. Though it might be difficult to prove that a violation to the right to life has been committed in relation to the pipeline, it is helpful to consider how the sites of cultural heritage and property are critical to their way of life.

As a final note, it is acknowledged that there is an argument for a hierarchy of human rights whereby the violation of some human rights could be considered to have more gravity than others.<sup>266</sup> In this sense, the jurisprudence before the ICTY on the

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Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 1996 I.C.J.595, ¶ 344 (Feb. 26, 2007).

263. *Id.*

264. *Id.* (citing Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 580 (Aug. 2, 2001)).

265. Al-Mahdi Report of Lostal, *supra* note 85, ¶ 47.

266. See, e.g., RHONA SMITH, INTERNATIONAL HUMAN RIGHTS LAW 219 (2018); Theodore Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT’L L. 1, 1–23 (1986); Koji Teraya, *Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights*, 12

crime against humanity of persecution found that “acts of persecutions, considered separately or together, should reach the level of gravity of other crimes listed in Article 5 of the Statute.”<sup>267</sup>

Relating this gravity assessment to the violation of human rights, the ICTY jurisprudence offered examples of those rights which, when violated, would rise to the level of persecution. It found that there was “no doubt that serious bodily and mental harm and infringements upon individual freedom may be characterised as persecution” stating that “infringements of the elementary and inalienable rights of man, which are “the right to life, liberty and the security of person,” the right not to be “held in slavery or servitude,” the right not to “be subjected to torture or to cruel, inhuman or degrading treatment or punishment” and the right not to be “subjected to arbitrary arrest, detention or exile” . . . by their very essence may constitute persecution when committed on discriminatory grounds.”<sup>268</sup> However, it went on to find that these were not the only violations to human rights which could rise to the level of persecution as a crime against humanity and that “acts rendered serious not by their apparent cruelty but by the discrimination they seek to instil within humankind” such as “confiscation or destruction of private dwellings or businesses, symbolic buildings or means of subsistence belonging to” a specific group could reach the gravity required to be considered persecution as crime against humanity.<sup>269</sup> The Appeals Chamber recognised that there might be questions about whether acts against property and not directly against a person, but which affect a group of peoples’ human rights, may rise to the level of crimes against humanity, and found that “the destruction of property, depending on the nature and extent of the destruction, may constitute a crime of persecutions of equal gravity to other crimes listed in Article 5 of the Statute.”<sup>270</sup>

Based on the facts concerning the pipeline, an argument could be made that the destruction of cultural heritage and property associated with the construction of the pipeline near

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EUR. J. INT’L L. 917, 918 (2001).

267. Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, ¶138 (July 29, 2004) [hereinafter Blaškić Judgment of 2004].

268. *Id.* ¶ 136; Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶ 220 (Mar. 3, 2000) [hereinafter Blaškić Judgment of 2000].

269. Blaškić Judgment of 2004, *supra* note 267, ¶ 136; Blaškić Judgment of 2000, *supra* note 268, ¶ 227.

270. Blaškić Judgment of 2004, *supra* note 267, ¶ 149.

Cannon Ball violated a series of fundamental human rights of the affected tribes, and that though these acts are against symbolic objects and property to the tribe members, when considered together, they have a discriminatory effect which rises to the level of persecution as a crime against humanity.

#### 5. Connection with another act in Article 7

Finally, the ICC's document on the Elements of Crimes states that in order to qualify as a crime against humanity of persecution the conduct must be "committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court."<sup>271</sup> The requirement for linking acts of persecution to other crimes under the Statute is a requirement that is unique to the ICC. The ICTY specifically rejected this requirement, and commented that although the "ICC Statute reflects customary international law in abolishing the nexus between crimes against humanity and armed conflict," this requirement is "not consonant with customary international law."<sup>272</sup> It has instead been explained that the requirement was added to prevent persecution's use as an "auxiliary offence."<sup>273</sup> The Trial Chamber in *Kupreskic* acknowledged that the requirement at the ICC "may be indicative of the *opinio juris* of many States," but that the ICTY "rejected the notion that persecution must be linked to crimes found elsewhere in the Statute" of the ICTY.<sup>274</sup>

In addition, the Trial Chamber's comments in *Kupreskic* suggested that the requirement "might easily be circumvented by charging persecution in connection with 'other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health' under Article 7(1)(k)."<sup>275</sup>

For the destruction or damage of cultural heritage, it depends on the facts of the situation, as the destruction of cultural heritage is not always committed in conjunction with other crimes such as murder, torture or rape, to name a few. However, for the situation concerning the Dakota Access

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271. ICC, ELEMENTS OF CRIMES, *supra* note 18, art. 7(1)(h).

272. Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, ¶ 580 (Jan. 14, 2000).

273. Gottlieb, *supra* note 55, at 875 n.85.

274. Prosecutor v. Kupreškić, *supra* note 272, ¶ 580.

275. *Id.* ¶ 580 (quoting the Rome Statute, *supra* note 10, art. 7(1)(k)).

Pipeline, the treatment of activists and protesters demonstrating against the construction of the pipeline and against the destruction of the cultural heritage at issue, could be viewed as constituting another ‘inhumane act’ causing great suffering or serious physical or mental injury.

There have been reports that activists and protesters, including members of the Standing Rock Sioux Tribe and Cheyenne River Sioux Tribe, have been physically abused through excessive force, including the use of rubber bullets, and unlawfully arrested en masse and mistreated in detention.<sup>276</sup> The reports have resulted in the UN Permanent Forum on Indigenous Issues initiating an investigation into the reported abuses,<sup>277</sup> and in the UN’s Special Rapporteur on the Rights of Indigenous Peoples expressing concern about the action of the authorities against the protesters.<sup>278</sup>

Therefore, there is a strong case to argue that these abuses against members of the Standing Rock Sioux Tribe and Cheyenne River Sioux Tribe, and the activists who support their interests, would constitute other inhumane acts under Article 7(1)(k) of the Rome Statute, and would provide the connection to another act which is required to bring a claim for the crime of persecution.

#### B. THE CONTEXTUAL ELEMENTS OF A CRIME AGAINST HUMANITY

Last, upon considering the requirements necessary to allege

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276. Sam Levin, *Dakota Access Pipeline: Native Americans Allege Cruel Treatment*, GUARDIAN (Oct. 30, 2016), <https://www.theguardian.com/us-news/2016/oct/31/dakota-access-pipeline-protest-investigation-human-rights-abuses>.

277. See, e.g., Statement by Mr. Álvaro Pop Ac, Chair of the Permanent Forum on Indigenous Issues, and Dr. Dalee Dorrough and Chief Edward John, Expert Members of the Permanent Forum on Indigenous Issues, on the escalating violence against unarmed protestors at the Dakota Access Pipeline construction site (North Dakota, USA) (Nov. 22, 2016), <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2016/11/Press-Release-on-the-Dakota-Access-Pipeline-22-Nov.-2016.pdf>; Sam Levin, *Dakota Access Pipeline Protests: UN group Investigates Human Rights Abuses*, GUARDIAN (Oct. 31, 2016); <https://www.theguardian.com/us-news/2016/oct/31/dakota-access-pipeline-protest-investigation-human-rights-abuses>; World Staff, *The United Nations Heads to North Dakota to Investigate Possible Human Rights Abuses*, PRI (Nov. 3, 2016), <https://www.pri.org/stories/2016-11-03/united-nations-heads-north-dakota-investigate-possible-human-rights-abuses>.

278. World Staff, *supra* note 277.

that the destruction of cultural heritage could constitute a crime of persecution during times of peace under the Rome Statute, it must be considered whether the crime rises to the level of a crime against humanity.

The ICC's document 'Elements of Crimes' sets out the elements for all crimes listed in the Rome Statute for which the ICC has jurisdiction. This includes the elements for each listed underlying crime under Article 7, including the underlying crime of persecution. When listing the crime against humanity of persecution the document notes that "[t]he last two elements for each crime against humanity describe the context in which the conduct must take place . . . clarify[ing] that the contextual elements for a crime against humanity are listed last.<sup>279</sup> Therefore, the contextual elements to make the crime of persecution a crime against humanity are listed as element 5 and 6 under the elements for Article 7(1)(h), and require that:

5. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

6. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.<sup>280</sup>

The definition of "attack" as set out at Article 7(2)(a) further provides the contextual element that the attack is committed "pursuant to or in furtherance of a State or organizational policy to commit such attack."<sup>281</sup>

The contextual elements to a crime against humanity were further reviewed in the Prosecution's decision to initiate an investigation into the destruction of cultural heritage in Mali. Here it was noted that to establish a crime against humanity, the contextual elements which must be proven include: "(i) an attack against any civilian population; (ii) a State or organizational policy; (iii) an attack of a widespread or systematic nature; (iv) a nexus between the individual act and the attack; and (v) the accused's knowledge of the attack."<sup>282</sup>

First, it must be noted that for the purpose of this analysis

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279. ICC, ELEMENTS OF CRIMES, *supra* note 18, at 5.

280. *Id.* at 10.

281. Rome Statute, *supra* note 10, art. 7(2)(a).

282. *Mali Article 53(1) Report*, *supra* note 14, ¶ 127.

concerning cultural heritage, this article sets out the contextual elements required for proving the commission of a crime against humanity of persecution but will not examine at length the case law defining and clarifying the requirements of the contextual elements which are common to all crimes against humanity. As it is necessary and helpful to set out what contextual elements are required and apply it to the case at hand, as done briefly below, the focus of this article will remain on how the underlying crime of persecution can be applied to situations where cultural heritage is damaged or destroyed during times of peace.

Therefore, in relation to the events concerning the Dakota Access Pipeline, it can be argued that all contextual elements for a crime against humanity are present. To start, the nature of the group or collectivity—the Native American tribes such as the Standing Rock Sioux Tribe and the Cheyenne River Sioux Tribe—have been discussed above and make clear that these Tribes are a civilian population.<sup>283</sup> Further, Article 7(2)(a) states that an “attack” only must be “a course of conduct involving the multiple commission of acts,”<sup>284</sup> and the Elements of Crimes clarifies that the “acts need not constitute a military attack.”<sup>285</sup> As detailed above,<sup>286</sup> the actions taken by the construction corporations on the pipeline are indeed a course of conduct which has repeatedly resulted in the commission of attacks on the cultural heritage which either harm, damage or destroy the sites and objects.

The nexus between the act of the potential perpetrator and the attack, as well as the perpetrator’s knowledge of the attack can also be said to be demonstrated in this case. As discussed in detail above,<sup>287</sup> the corporations involved in construction are connected to acts which resulted in the destruction of cultural heritage, particularly through steps taken to prepare the land for construction and the actual construction of the pipeline. The corporation’s knowledge about the attack can be established in that they were made aware of the damage construction could, and had caused, during, among other things, the protests of the

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283. *See supra* pp. 163–68.

284. Rome Statute, *supra* note 10, art. 7(2)(a).

285. Situation in the Republic of Kenya, ICC-01/9-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 80 (Mar. 31, 2010); ICC, ELEMENTS OF CRIMES, *supra* note 18, art. 7.

286. *See, e.g., supra* pp. 191–97.

287. *Id.*



tribes and legal actions taken to argue that the pipeline would damage or destroy important cultural sites and objects or to highlight the damage and destruction caused after construction.<sup>288</sup>

As for the requirement of a State or organizational policy, jurisprudence before the ICC has given guidance on what is necessary to set out that an attack was committed “pursuant to or in furtherance of a State or organizational policy to commit such attack.”<sup>289</sup> Criteria identified for establishing a policy include that:

- a) it must be thoroughly organised and follow a regular pattern;
- b) it must be conducted in furtherance of a common policy involving public or private resources;
- c) it can be implemented either by groups who govern a specific territory or by an organisation that has the capability to commit a widespread or systematic attack against a civilian population; and
- d) it need not be explicitly defined or formalised (indeed, an attack which is planned, directed or organised—as opposed to spontaneous or isolated acts of violence—will satisfy this particular criterion).<sup>290</sup>

As for the term ‘organizational’, ICC jurisprudence sets out that it is not “the formal nature of a group and the level of its organization” that determines whether the requirements for an organization under Article 7(2)(a) are established but instead “whether a group has the capability to perform acts which infringe on basic human values.”<sup>291</sup>

288. *Id.*

289. ICC, ELEMENTS OF CRIMES, *supra* note 18, art. 7(2)(a).

290. Situation in the Republic of Cote D'Ivoire, ICC-02/11-14-Corr, Corrigendum to “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire”, ¶ 43 (Nov. 15, 2011); Iryna Marchuk, *No Crimes Against Humanity During the Maydan Protests in Ukraine? Or the ICC Prosecutor's Flawed Interpretation of Crimes Against Humanity*, 35 B.U. INT'L L.J. 39, 57 (2017).

291. See Situation in the Republic of Kenya, *supra* note 285, ¶ 90; see also Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the

In the case of the Dakota Access Pipeline, the policy of the organizations which own, construct and operate the pipeline has been extensively set out.<sup>292</sup> The corporations involved in the construction of the pipeline followed a regular pattern as a result of the common policy to construct the pipeline, by way of private funds of the corporations involved. This common policy effectuated a regular pattern of progressive acts taken during the construction process which destroyed the cultural heritage of the tribes located along the pipeline. Furthermore, the license obtained by corporations from the US Government to construct the pipeline and the finalised plans for routing of the pipeline establish that there was a formalized policy and that the corporations in this case maintained the capacity to take steps which would attack the cultural heritage of the tribes; thus also demonstrating fulfilment of the definition of ‘organization’ under Article 7(2)(1).

This leaves consideration of whether the acts at hand were widespread and systematic in nature. The term ‘widespread’ speaks to the scale of the attack and is defined by the ICC as “the large scale nature of the attack, which should be massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims.”<sup>293</sup> The term ‘systematic’ refers to the nature of the attack and is defined by the ICC as referring to the “organised nature of the acts of violence and the improbability of their random occurrence.”<sup>294</sup>

As noted above, reports on the impact of constructing the pipeline have detailed that construction would affect lands

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Prosecutor Against Jean-Pierre Bemba Gombo, ¶ 81 (June 15, 2009); Prosecutor v. Katanga, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, ¶ 396 (Sept. 30, 2008) (stating that “organization” can be defined as “any organization with the capability to commit a widespread or systematic attack against a civilian population”); Charles Chernor Jalloh, *What Makes a Crime Against Humanity a Crime Against Humanity*, 28 AM. U. INT’L L. REV. 381, 421 (2013).

292. See, e.g., *supra* pp. 191–97.

293. See Situation in the Republic of Kenya, *supra* note 285, ¶ 95 (citing Prosecutor v. Jean-Pierre Bemba Gombo, *supra* note 291, ¶ 83); Prosecutor v. Musema, ICTR-96-13-A, Appeal Judgment, ¶ 204 (Jan. 27, 2000); Prosecutor v. Katanga, *supra* note 291, ¶ 580.

294. See Situation in the Republic of Kenya, *supra* note 285, ¶ 96 (citing Prosecutor v. Katanga, *supra* note 291, ¶ 394); Prosecutor v. Harun, ICC-02/05-01/07-1-Corr, Decision on the Prosecution Application under Article 58(7) of the Statute, ¶ 62 (Apr. 27, 2007); Prosecutor v. Tadic, IT-94-1-T, Judgment, ¶ 648 (May 7, 1997); Prosecutor v. Kordić & Čerkez, IT-95-14/2-A, Appeal Judgment, ¶ 94 (Dec. 17, 2004); Prosecutor v. Blaškić, IT-95-14-A, Appeal Judgment, ¶ 101 (July 29, 2004).

sacred to Native American Tribes along many parts of the pipeline, and would affect tribes other than the Standing Rock Sioux Tribe and Cheyenne River Sioux Tribe.<sup>295</sup> In addition to allegations of serious damage and destruction of cultural and religious property and heritage to the local Tribes, it has been argued that the pipeline would negatively impact the environmental integrity of the water sources near the pipeline, such as with the Missouri River and Lake Oahe, and would therefore affect the Tribe's cultural and spiritual relationship with these water sources.<sup>296</sup> The events which resulted in the destruction and damage to cultural heritage on September 3, 2016 near Canon Ball are only one instance highlighted, and therefore the number of sites affected as a result of the construction of the pipeline demonstrate the widespread and systematic nature of the harm—i.e. the widespread or large scale of the continuous and numerous attacks on cultural heritage through construction along the entire pipeline, and the systematic or organised nature of the attacks through the plans to repeatedly take steps in the construction process which would harm cultural heritage.

Therefore, it can be argued that the contextual elements for a crime against humanity can be established in this case, and the destruction and damage to cultural heritage of importance to the Standing Rock Sioux Tribe and Cheyenne River Sioux Tribes could rise to the level of a crime against humanity of persecution under Article 7 (1)(h) of the Rome Statute.

## VIII. CONCLUSION

Above, it is proposed that a person most responsible for destroying or damaging cultural heritage or property during a time of peace may be held individually criminally responsible as having committed the crime against humanity of persecution, specifically as set out in Article 7(1)(h) of the Rome Statute. The argument is made that such an application of Article 7(1)(h) is compatible with international criminal law, international human rights law and is supported by the development of customary international law regarding the protection of cultural property and heritage.

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295. Eagle Declaration of Aug. 4, 2016, *supra* note 23, ¶¶ 24–40.

296. See Complaint of 27 July 2016, *supra* note 26, ¶¶ 77–79; Memorandum of Feb. 14, 2017, *supra* note 22, at 4.

In making this argument, the article examined the elements which would need to be proven in order find that an act of destruction or damage to cultural property or heritage is a crime against humanity of persecution before the ICC finding that, to apply Article 7(1)(h) it would have to be established first, that a site or object of cultural heritage or property, not used for military purposes, was destroyed or damaged extensively as a result of the perpetrator's actions. Second, it must be demonstrated that the perpetrator intended to destroy or damage the site or object extensively or had knowledge of the likelihood that the actions would result in such harm and nevertheless acted with reckless disregard. Third, the cultural heritage or property which was damaged or destroyed must be linked to a civilian population by explaining how the cultural heritage or property was associated with the civilian population and therefore establishing that the attack against the civilian population was essentially targeting the group or collectivity based on political, racial, national, ethnic, cultural, religious, gender or other grounds. Fourth, it must be shown that the harm caused by the destruction or damage of the cultural heritage resulted in the deprivation of a grave and fundamental human right of the group. Fifth, the attack against the cultural heritage or property must be connected to another act within Article 7, and last, the attack must be shown to be part of a widespread or systematic attack against the civilian population.

This article concludes that the events concerning the Dakota Access Pipeline's construction, and in particular the events near Canon Ball, North Dakota on September 3, 2016, which resulted in the destruction and damage of cultural heritage and property such as stone structures and burial grounds, could rise to the level of, and fit within the definition of, a crime against humanity of persecution under Article 7(1)(h) of the Rome Statute, and as a result, corporations responsible for the ownership and construction of the pipeline could be vulnerable to investigation or prosecution before the ICC.