



## Indigenous Resistance to the Dakota Access Pipeline

criminalization of dissent and  
suppression of protest

Report to the United Nations Special  
Rapporteur on the Rights of Indigenous  
Peoples, Victoria Tauli-Corpuz

Prepared by faculty and students of the International  
Human Rights Advocacy Workshop at the University of  
Arizona Rogers College of Law on behalf of the Water  
Protector Legal Collective

## Introduction

1. Peaceful demonstrations are a catalyst for the advancement of human rights. Yet around the world governments are criminalizing dissent and suppressing public protest, often as a means to protect corporate interests. In this context, indigenous peoples increasingly find themselves as the subjects of criminal prosecution and police violence when defending the lands they rely upon for their existence and survival from resource extraction.

2. This report is submitted to the United Nations (UN) Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz in response to her call for contributions to a thematic report on the criminalization of indigenous human rights defenders worldwide. The following case study details the indigenous resistance to the Dakota Access Pipeline Project (DAPL)<sup>1</sup> and the United States (US) government's use of excessive force and mass arrests to threaten, intimidate, and silence "water protectors" seeking to defend their lands, resources, and culture. The violent actions of state law enforcement officers and the state's failure to protect human rights defenders from private security forces violate fundamental human rights to free speech and assembly enshrined in international human rights law<sup>2</sup> and the US Constitution.<sup>3</sup>

3. In the report on her mission to the United States, Rapporteur Tauli-Corpuz expressed her concern with the treatment of indigenous human rights defenders resisting the construction of DAPL.<sup>4</sup> Since that time, water protectors continue to suffer impacts from the criminalization of their dissent, while the state moves forward permitting new pipeline projects on indigenous territories.<sup>5</sup> We urge Ms. Tauli-Corpuz and other UN special procedure mandate holders<sup>6</sup> to report to the UN Human Rights Council and General Assembly on this situation of special importance regarding the promotion and protection of free speech and assembly and the rights of indigenous human rights defenders.

## Background on Dakota Access Pipeline Project

4. The 1172-mile DAPL crosses the Missouri River in North Dakota half a mile north of the Standing Rock Sioux reservation and continues south towards the Gulf Coast.<sup>7</sup> The pipeline intersects the traditional territory of the Great Sioux Nation or Oceti Šakowij – the "Seven Council Fires" – who have occupied the area since time immemorial. The territory was formally recognized in the 1851 Fort Laramie Treaty with the United States government. A second treaty signed in 1868 created the Great Sioux reservation.<sup>8</sup> The US Army Corps of Engineers ("Army Corps"), a federal agency, issued the permits necessary for the construction of the pipeline. The pipeline was permitted despite express objections from the Standing Rock Sioux, in the absence of meaningful consultation and without the free, prior and informed consent of the affected tribes: Standing Rock Sioux, Yankton Sioux, and Cheyenne River Sioux.<sup>9</sup> This lack of consultation violates US obligations under the UN Declaration on the Rights of Indigenous Peoples.<sup>10</sup>

5. On December 4, 2016, during Barack Obama's presidency, the Army Corps denied an easement, effectively halting construction of the pipeline,<sup>11</sup> and later announced it would begin a comprehensive environmental review of the project.<sup>12</sup> Four days after his inauguration, President Donald Trump quickly moved to undo the Obama-era decision and issued a presidential memorandum to approve and expedite construction of the pipeline.<sup>13</sup> This executive action prompted the Army Corps to forgo further environmental impact studies and grant the easement.<sup>14</sup> The pipeline became operational on June 1, 2017. Shortly thereafter, the US District Court for the District of Columbia found that the Corps "did not adequately consider the impacts of an oil spill on the fishing rights, hunting rights, or environmental justice, or the degree to which the pipeline's effects are likely to be highly controversial."<sup>15</sup> The Dakota Access pipeline leaked at least five times in 2017.<sup>16</sup> The District Court recognized the inherent risk of oil

pipelines to tribal lands and ordered: (1) the finalization and implementation of oil-spill response plans at Lake Oahe; (2) completion of a third-party compliance audit; and (3) public reporting of information regarding pipeline operations.<sup>17</sup> The company, Energy Transfer Partners, has been allowed to continue operating the pipeline while the new environmental analysis moves forward despite court precedent requiring operations to cease pending compliance with the National Environmental Protection Act.<sup>18</sup>

6. The pipeline poses significant harm to the tribes' primary source of drinking water and threatens sacred sites.<sup>19</sup> An oil spill in the Missouri River is more than a minor encroachment on land, it threatens the tribes' physical and cultural survival.<sup>20</sup> Standing Rock has stated that "subsistence hunting and fishing, and the cultural norms that remain intact, are jeopardized by an oil spill from DAPL."<sup>21</sup>

## Facts Supporting Human Rights Violations

7. As it became clear that the pipeline construction would proceed in the absence of meaningful consultation and consent, indigenous leaders and community members gathered to oppose construction of the pipeline and to protect their rights to lands and resources; self-determination; equality; religion; culture; and free prior and informed consent.<sup>22</sup>

8. In August 2016, a call was issued for international observers<sup>23</sup> that was taken up by Amnesty International,<sup>24</sup> and many other indigenous nations, organizations, media outlets and individual supporters. Chief Edward John of the UN Permanent Forum on Indigenous Issues, and Mr. Baskut Tuncak, UN Special Rapporteur on Human Rights and Hazardous Substances and Wastes,<sup>25</sup> were among the international observers who visited the camp. By September, thousands of indigenous water protectors and their allies had gathered at Oceti Šakowij camp and other encampments to resist the construction of the pipeline. It became the largest gathering of indigenous peoples in the United States in over 100 years.<sup>26</sup>

9. During the 7 months from September 2016 to February 2017, at least 76 different law enforcement agencies,<sup>27</sup> federal agencies, and private security firms hired by the oil company were present at some time. Law enforcement and private security donned heavy-duty riot gear and used military grade weapons against water protectors.<sup>28</sup> It is reported that the oil company, TigerSwan,<sup>29</sup> and other contractors and consultants were at times directing law enforcement.<sup>30</sup> This substantiates the concerns of the UN Special Rapporteur on Human Rights Defenders over the "growing tendency worldwide for public forces to have dual functionality [as] [m]emorandums of understanding between companies and police forces often contribute to the blurring of limits between public and private security, a situation in which the police become the asset of private interests and fail to protect local communities."<sup>31</sup>

10. On September 3, 2016, about 200 water protectors were gathered in a peaceful march and pipe ceremony when they encountered workers bulldozing an ancestral burial site identified in court filings the previous evening as an area of historical, archaeological, spiritual, and cultural significance.<sup>32</sup> Security guards employed by Frost Kennels LLC and 10-Code Security arrived with attack dogs that bit a number of indigenous water protectors.<sup>33</sup>

11. On October 27, 2016, hundreds of law enforcement<sup>34</sup> in Humvees and helicopters discharged a Long Range Acoustic Device sound weapon, explosive teargas grenades, chemical agents, Tasers, rubber bullets, batons and a Directed Energy weapon on water protectors.<sup>35</sup> 142 people were arrested, some in the midst of prayer ceremonies.<sup>36</sup>

12. The most violent attacks occurred on November 20 on the Backwater Bridge after a few individuals tried to remove abandoned vehicles that law enforcement used to barricade Highway 1806.<sup>37</sup> Law enforcement immediately began shooting Specialty Impact Munitions (SIM)<sup>38</sup> and chemical agents at the individuals as a crowd began to gather. More law enforcement agencies arrived in armored vehicles and used high pressure fire hoses to spray water protectors, and shot SIM, chemical agent canisters, explosive teargas and “stinger” grenades indiscriminately into the crowd over a period of about ten hours, without any warning.<sup>39</sup> Over 200 people were injured,<sup>40</sup> including a 31-year-old Navajo woman permanently disabled after she was shot in the eye with a tear gas canister launched by an officer.<sup>41</sup> She is one of nine named plaintiffs in a class action lawsuit against law enforcement on behalf of those injured on November 20. The court denied the plaintiffs’ initial requests to restrict law enforcement from using dangerous weapons on peaceful crowds.<sup>42</sup> The lawsuit is advancing in the US District Court in Bismarck, N.D. on the claims for monetary compensation and a permanent injunction but is facing a motion to dismiss.<sup>43</sup>

13. On November 25, 2016, the Army Corps issued an eviction notice advising the Standing Rock Sioux Tribal Chairman that they would be closing access to the Oceti Šakowin camp by December 5, 2016.<sup>44</sup> The last remaining water protectors were evicted on February 23, 2017.

14. Over these 7 months, law enforcement and prosecutors aggressively arrested and charged hundreds of water protectors exercising their rights to free expression and peaceful assembly.<sup>45</sup> Disaggregated data on the number of indigenous defendants is not available at this time but the Water Protector Legal Collective (WPLC) reports that all seven federal defendants facing the harshest charges for civil disorder *inter alia*, are indigenous and hundreds of the state defendants identify as indigenous people. According to the WPLC, many of the criminal cases should never have been brought or continued due to lack of evidence and witnesses, lack of probable cause and legal defenses of privilege and lawful conduct. As of the writing of this report, there are seven federal cases, three of which are plea deals with the prosecution recommending 36 months of prison time. Out of an initial total of 832 North Dakota state criminal cases: approximately 300 remain open and unresolved; 174 are proceeding to trial; 102 are inactive or in warrant status; 316 were dismissed; 20 were acquitted at trial; 13 were convicted at trial; 82 were resolved with pre-trial diversion; 120 took plea agreements; and 4 are on appeal.<sup>46</sup>

15. One indigenous human rights defender, an Oglala Sioux woman, faces a substantial federal prison term related to an incident on October 27, 2016.<sup>47</sup> Officers allege that a gun was discharged as they pinned her to the ground in an attempt to handcuff her. The gun belonged to a paid FBI informant who became her boyfriend weeks before the shooting and planned to testify against her at trial.<sup>48</sup> She spent a year in pre-trial detention. During legal proceedings, virtually every motion made by her defense team was denied.<sup>49</sup>

## State efforts to suppress protest and criminalize dissent

16. The United States takes pride in the constitutional protections of the rights to free expression and assembly, as being stronger in the US than virtually any other place in the world.<sup>50</sup> This reputation may soon change. As the President of the Inter-American Commission on Human Rights (“Inter-American Commission”) stated during a recent hearing on the rights to freedom of association, peaceful assembly, and freedom of expression in the United States: “We are concerned about what has been happening lately.... there is a regression in these pillars of democracy.... from the highest levels of power.”<sup>51</sup>

17. As of the date of this report, 31 US states have proposed 58 anti-protest<sup>52</sup> bills, 8 have passed into law and 22 have been defeated with 28 still pending in state legislatures.<sup>53</sup> Two of the 8 anti-protest bills were

passed in North Dakota.<sup>54</sup> In early 2017, the North Dakota state legislature introduced a bill<sup>55</sup> that eliminated civil and criminal liability for drivers running into protestors blocking public roads, a method increasingly used to attack protestors.<sup>56</sup> The bill's sponsor explained that it was in direct response to DAPL.<sup>57</sup> Fortunately, this bill was not passed by the legislature<sup>58</sup> but similar bills are being introduced around the country.<sup>59</sup> These laws progress towards criminalizing dissent and condoning the use of excessive force towards human rights defenders including indigenous peoples. UN experts condemned these anti-protest bills as being incompatible with domestic and international law.<sup>60</sup>

18. In South Dakota, a Senate bill was passed to restrict protest to twenty or fewer people and increase penalties for protest on public lands.<sup>61</sup> The legislation was a direct response to DAPL and passed in anticipation of indigenous resistance to the Keystone XL pipeline in South Dakota.<sup>62</sup> The Governor sent letters to nine tribal chairmen encouraging them to “work together to manage potential protests that are likely to occur in South Dakota relating to the KXL Pipeline.”<sup>63</sup> Tribal leaders objected to the bill and said it “targeted Native Americans and that tribes were not adequately consulted.”<sup>64</sup>

## Failure to protect indigenous human rights defenders

19. The situation at Standing Rock is not an isolated event but part of a pattern of violence and discrimination against indigenous peoples. It is one example of an increasing trend to criminalize indigenous peoples, organizations and movements voicing opposition to energy extraction and other projects carried out without their participation or consent.<sup>65</sup> In many parts of the world indigenous peoples are disproportionately affected by police violence and imprisoned without due process as they defend against corporations looking to exploit their lands and resources.<sup>66</sup>

20. The law enforcement response to peaceful protests at Standing Rock stands in stark contrast to other occupations and armed protests of a violent nature involving non-indigenous peoples, namely the Neo-Nazi march in Charlottesville, Virginia<sup>67</sup> and standoffs in the states of Oregon and Nevada led by the Bundy family and anti-government militias.<sup>68</sup> In both these cases there was little intervention by law enforcement compared to the militarized response at Standing Rock.<sup>69</sup> In this respect, the state has failed to take special measures to protect indigenous water protectors defending their lands, resources and cultural survival, a requirement noted by UN Rapporteur on the rights of indigenous peoples, James Anaya, in his 2013 report to the Human Rights Council.<sup>70</sup>

21. The Inter-American Commission has also identified indigenous peoples as particularly vulnerable human rights defenders<sup>71</sup> and outlined the duties States have to protect human rights in the context of extractive industry development<sup>72</sup> including: 1) the duty to prevent violence; 2) the duty to guarantee access to justice through investigation and punishment; and 3) access to adequate reparations for human rights violations.<sup>73</sup> The Inter-American Commission joined regional UN human rights offices in issuing a statement of concern over the deteriorating situation for human rights defenders in the Americas.<sup>74</sup> They noted “among the groups most affected by this violence are defenders of the land, territory, and environment” and that “rights defenders in the region face a series of obstacles to their efforts, such as criminal cases brought against them for their work or smear campaigns to stigmatize and defame them.”<sup>75</sup>

22. The UN Special Rapporteur on the situation of human rights defenders, Michel Forst, recently reported that violations against defenders mostly occur within energy sectors operating in communities and include criminalization, killings, intimidation, and threats.<sup>76</sup> He warned that “[h]uman rights defenders who are pressing for companies to be held accountable should not be criminalised or threatened.”<sup>77</sup>



## Conclusions and Recommendations

23. Freedom of expression, association, and peaceful assembly are secured by the First Amendment of the United States Constitution<sup>78</sup> and international human rights law.<sup>79</sup> The United States has a positive obligation to ensure and protect these rights. As the UN Rapporteur on Freedom of Expression noted, the US has ratified the International Covenant on Civil and Political Rights and so the “[c]ovenant enjoys status under the US Constitution as supreme law of the land.”<sup>80</sup> Furthermore, the UN Declaration on Human Rights Defenders protects the right to defend human rights, including the right to free expression and assembly, from violations by state agents and private entities.<sup>81</sup>

24. The United States has failed in its duty to prevent and protect against the use of excessive force and unlawful arrests and to investigate, punish, and provide reparations for these human rights abuses. By condoning the behavior of state law enforcement and private security in this context, the state is normalizing, encouraging, and emboldening state and non-state actors to act similarly in future situations.

25. We urge the Special Rapporteur to reiterate her requests to the United States to “develop and provide anti-oppression and anti-racism training to federal and state law enforcement agents, and to mandate the Department of Justice to open an investigation into the excessive use of force and militarized response to the water protectors at the Standing Rock Sioux Reservation, including the use of non-lethal weapons.”<sup>82</sup> In addition, we ask the Rapporteur to include the following recommendations to the US in her report on the criminalization of indigenous human rights defenders:

- a) Review and reconsider criminal proceedings against water protectors and direct prosecutors to seek proportionate<sup>83</sup> penalties for protestors who violate the law;
- b) Investigate, punish, and provide appropriate reparations for all human rights violations, including the use of excessive force and mass arrests in response to DAPL opposition;<sup>84</sup> OR convene a truth commission with the indigenous representative institutions of the Oceti Šakowin;
- c) Adopt a regulatory framework to supervise and monitor activities of extractive industries and energy companies,<sup>85</sup> private security firms and other non-state actors to prevent human rights violations in regard to activities that affect indigenous peoples and their lands;
- d) Provide training to law enforcement and private security on best practices for managing peaceful demonstrations; the right to free expression and assembly; and indigenous peoples rights under international law;<sup>86</sup>
- e) Implement national measures to protect indigenous human rights defenders in compliance with the UN Declaration on Human Rights Defenders, the UN Declaration on the Rights of Indigenous Peoples and other international standards to ensure the full enjoyment of their rights to free expression and assembly;<sup>87</sup>
- f) Issue executive order regulating and restricting transfer of military-grade weapons and equipment to local law enforcement;<sup>88</sup>
- g) Reject or amend state legislation that violates the right to free assembly;
- h) Ensure that state and local emergency powers are not abused in the context of social protest; and
- i) Implement the UN Declaration on the Rights of Indigenous Peoples and recommendations on indigenous peoples rights issued to the United States by the UN Treaty Bodies, Universal Periodic Review process, UN Special Procedures and the Inter-American System of Human Rights.<sup>89</sup>

26. We further urge the Rapporteur to report on the corporate conduct and human rights accountability of the companies and investors behind the Dakota Access Pipeline<sup>90</sup> and the need to sanction those responsible for human rights violations.

Submitted March 16, 2018 by:



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<sup>1</sup> “The Dakota Access Pipeline (DAPL) and the Energy Transfer Crude Oil Pipeline (ETCO), collectively the “Bakken Pipeline” went into service on June 1, 2017. The Bakken Pipeline is a 1,872-mile, mostly 30-inch pipeline system that transports domestically produced crude oil from the Bakken/Three Forks productions areas in North Dakota to a storage and terminalling hub outside Patoka, Illinois, and/or down to additional terminals in Nederland, Texas. The Bakken Pipeline is a joint venture between Energy Transfer Partners with a 38.25 percent interest, MarEn Bakken Company LLC (“MarEn”) with a 36.75 percent interest, and Phillips 66 Partners with a 25 percent interest. MarEn is an entity owned by MPLX LP and Enbridge Energy Partners L.P.” Energy Transfer Partner L.P., Bakken website [http://www.energytransfer.com/ops\\_bakken.aspx](http://www.energytransfer.com/ops_bakken.aspx)

<sup>2</sup> Right to free expression- Article 19 of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR); Right to free assembly- Article 20 UDHR & Article 22 ICCPR; Right to security of the person-Article 3 UDHR & Art. 9 ICCPR; Right to be free from arbitrary arrest and detention- Article 9 UDHR & ICCPR; Right to be free from inhuman and degrading treatment-Article 5 UDHR & Article 7 ICCPR.

<sup>3</sup> “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” U.S. CONST. amend. I, 1789 (rev. 1992).

<sup>4</sup> Victoria Tauli-Corpuz noted her concern over the “militarized, at times violent, escalation of force by local law enforcement and private security forces” ... “the aggressive manner in which peaceful demonstrations were met by local, state, private and national guards’ ... “testimonies of war-like conditions and cases of blunt force trauma and hypothermia as a result of battery with batons, attack dogs and water cannons blasting individuals at freezing temperatures”... “protestors being strip searched and placed in kennels as temporary holding cells during various and frequent mass raids by local, state and federal enforcement officials, sometimes in the middle of a spiritual and cultural energy cleansing ritual” and information that “over 700 indigenous and non-indigenous people were arrested during the protests, some of whom remain in custody.” Report of the Special Rapporteur on the Rights of Indigenous Peoples on her Mission to the United States of America, A/HRC/36/46/Add.1 (Aug. 9, 2017) [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/36/46/Add.1](http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/36/46/Add.1)

<sup>5</sup> Energy Transfer Partners continues to push the construction of the Bayou Bridge Pipeline, the last segment of the Bakken Pipeline that traverse through the traditional territories of the United Houma Nation in the state of Louisiana. Monique Verdin, United Houma Nation Tribal Council member stated: “It’s heartbreaking, but not surprising, that the Army Corps of Engineers would approve another pipeline to be rammed through our already over exploited and fragile south Louisiana land and waters. 80,000 plus miles of pipelines crisscross our state and all those promises of jobs and progress, over the decades, have created places we call Cancer Alley and a state with some of the highest poverty in the nation. The Houma Nation and all those south of the proposed Bayou Bridge pipeline route deserve the right to clean water for drinking, for bathing, for fishing, for life. We know the risks and Energy Transfer Partners has got the track record for us to know the gamble is not worth it.” #Stop ETP, *Joint Statement on the U.S. Army Corps of Engineers’ Approval of the Bayou Bridge Pipeline* (Dec. 15, 2017) <http://stopetp.org/2017/12/15/bbp-approval-response/> In other places across the United States, indigenous peoples are defending treaty lands against Mariner East 2, Enbridge Line 3 and Keystone XL. See Sharon Kelly, *Pennsylvania Suspends Mariner East 2 Pipeline Construction, Citing Sunoco’s ‘Egregious and Willful’ Violations*, Desmog (January 3, 2018)



<https://www.desmogblog.com/2018/01/03/pennsylvania-suspends-mariner-east-ii-fossil-fuel-pipeline-work-citing-egregious-and-willful-law-violations-sunoco>; See also Jessica Chin, *Indigenous Activists Are Building Tiny Houses to Protest B.C. Trans Mountain Pipeline*, Huff Post (September 8, 2017), [http://www.huffingtonpost.ca/2017/09/08/indigenous-activists-are-building-tiny-houses-to-protest-b-c-trans-mountain-pipeline\\_a\\_23202037/](http://www.huffingtonpost.ca/2017/09/08/indigenous-activists-are-building-tiny-houses-to-protest-b-c-trans-mountain-pipeline_a_23202037/) Honor The Earth, *Indigenous Groups Lead Movement to Call on Banks to Drop Enbridge's Controversial Line 3 Pipeline*, Honor The Earth (September 21, 2017), [https://d3n8a8pro7vhmx.cloudfront.net/honorearth/pages/2406/attachments/original/1506371831/Line\\_3\\_Bank\\_Letter\\_FINAL.pdf?1506371831](https://d3n8a8pro7vhmx.cloudfront.net/honorearth/pages/2406/attachments/original/1506371831/Line_3_Bank_Letter_FINAL.pdf?1506371831) "A coalition including several tribes, native-led organizations, and environmental nonprofits released a call to action, asking people to sign up to commit to creative peaceful resistance along the pipeline route when construction begins on KXL, likely next spring." Allen Brown, *Nebraska Approves Keystone Pipeline as Opponents Face Criminalization of Protests*, The Intercept (Nov 20, 2017), <https://theintercept.com/2017/11/20/nebraska-approves-keystone-xl-pipeline-as-opponents-face-criminalization-of-protests/>

<sup>6</sup> Special Rapporteur on the situation of human rights defenders, Mr. Michel Forst; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye; Special Rapporteur on the rights to freedom of peaceful assembly and of association, Mr. Maina Kiai; Special Rapporteur on the human right to safe drinking water and sanitation, Mr. Léo Heller; Special Rapporteur on human rights and the environment, Mr. John H. Knox; Special Rapporteur on cultural rights, Ms. Karima Bennouna; Special Rapporteur on human rights and hazardous substances and wastes, Mr. Baskut Tuncak; and Chairperson of the Working Group on business and human rights, Mr. Pavel Sulyandziga.

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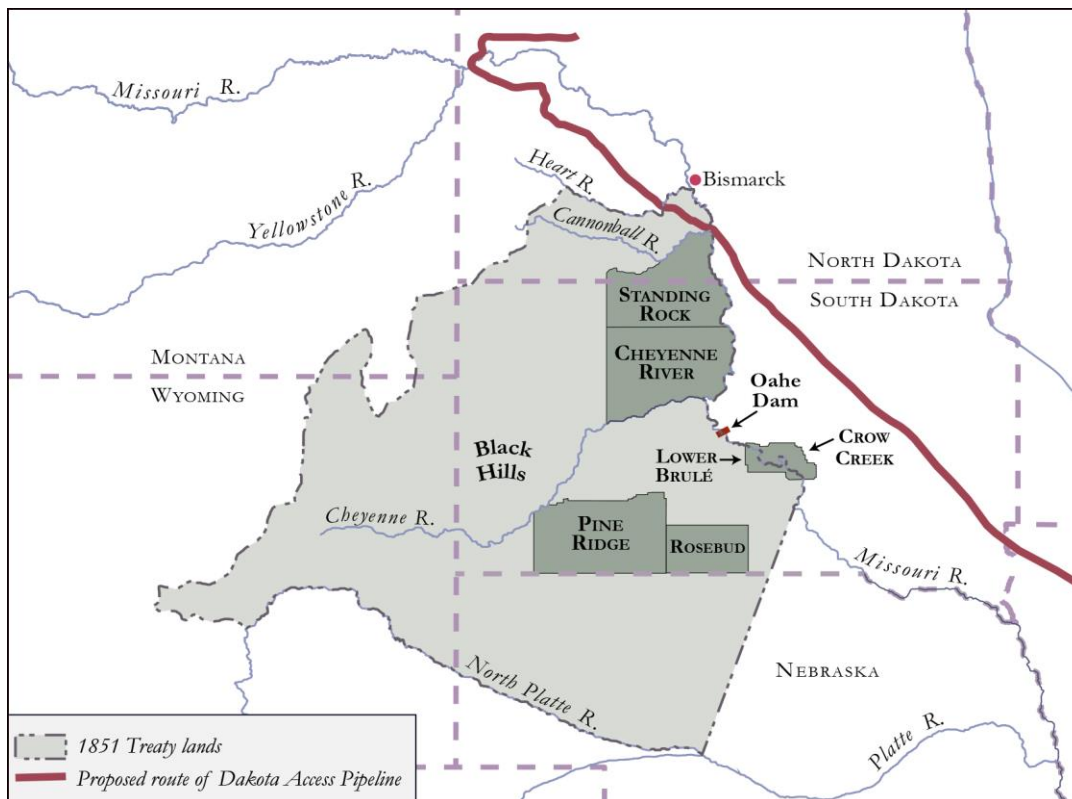


Photo source: *'The Supreme Law of the Land': Standing Rock and the Dakota Access Pipeline, Shouldn't the US obey the Constitution?* Jeffrey Ostler and Nick Estes, Indian Country Today (Jan 16, 2017).

<https://indiancountrymedianetwork.com/news/opinions/supreme-law-land-standing-rock-dakota-access-pipeline/>

<sup>8</sup> For a more details on the status of the lands, pipeline permitting and construction See: Complaint for Declaratory and Injunctive Relief, Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers, 1:16-cv-01534, U.S. District Court for the District of Columbia (July 27, 2016) ("Complaint, Standing Rock")

<https://earthjustice.org/sites/default/files/files/3154%201%20Complaint.pdf>; Complaint for Declaratory and

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Injunctive Relief, Yankton Sioux Tribe et. al. v. United States Army Corps of Engineers et al., 1:16-cv-01796, U.S. District Court for the District of Columbia (Sept. 8, 2016) (“Complaint, Yankton Sioux”) <https://www.courtlistener.com/recap/gov.uscourts.dcd.181496.1.0.pdf>

<sup>9</sup> The Yankton Sioux Tribe was not consulted. Complaint, Yankton Sioux Tribe, *supra* note 8. The Cheyenne River Sioux participated in public forums and submitted comments, but has not had real consultation with the Corps. The Standing Rock Sioux repeatedly expressed concerns and objections to no avail.

See precautionary measures requested by the Standing Rock Sioux Tribe, the Cheyenne River Sioux Tribe, and the Yankton Sioux Tribe: *Request for Precautionary Measures Pursuant to Article 25 of the Inter-American Commission Rules of Procedure Concerning Serious and Urgent Risks of Irreparable Harm Arising Out of Construction of the Dakota Access Pipeline* (December 2, 2016) ¶¶102-125 <https://www.scribd.com/document/333074630/Standing-Rock-Cheyenne-River-Yankton-Sioux-Tribes-Request-for-Precautionary-Measures-FINAL-Dec-02-2016-With-Exhibits>

<sup>10</sup> United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf) Article 18: “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions.”

Article 19: “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”

Article 32(2): “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”

<sup>11</sup> Memo from Joe Ellen Darcy, Asst. Sec. of the Army, Department of Defense to Commander, U.S. Army Corps of Engineers, *Proposed Dakota Access Pipeline crossing at Lake Oahe, North Dakota*, (undated) <https://www.army.mil/e2/c/downloads/459011.pdf>

<sup>12</sup> *Department of the Army, Notice of Intent To Prepare an Environmental Impact Statement in Connection With Dakota Access, LLC's Request for an Easement To Cross Lake Oahe, North Dakota*, 82 Fed Reg. 5543, 5543-5545 (January 18, 2017) Doc No: 2017-00937 <https://www.federalregister.gov/documents/2017/01/18/2017-00937/notice-of-intent-to-prepare-an-environmental-impact-statement-in-connection-with-dakota-access-llcs>

<sup>13</sup> Memo from President Donald J. Trump to the Secretary of the Army, *Presidential Memorandum Regarding Construction of the Dakota Access Pipeline* (January 24, 2017) <https://www.gpo.gov/fdsys/pkg/DCPD-201700067/pdf/DCPD-201700067.pdf>

<sup>14</sup> U.S. Army Corps of Engineers, *Corps grants easement to Dakota Access, LLC* (February 8, 2017), <http://www.nwo.usace.army.mil/Media/News-Releases/Article/1077134/corps-grants-easement-to-dakota-access-llc/>

<sup>15</sup> *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101, 102 (D.D.C. June 14, 2017) (“Memorandum Opinion”) <https://www.leagle.com/decision/infdc020170615a83>

<sup>16</sup> Alleen Brown, *Five Spills, six months in operation: Dakota Access Track Record Highlights Unavoidable Reality-Pipelines Leak*, *The Intercept* (Jan. 9 2018) <https://theintercept.com/2018/01/09/dakota-access-pipeline-leak-energy-transfer-partners/>

<sup>17</sup> *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 16-1769, 2017 WL 6001726, 3 (D.D.C. Dec. 4, 2017). <https://earthjustice.org/sites/default/files/files/Order-re-conditions.pdf>

<sup>18</sup> See cases cited in *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, Plaintiffs Reply Brief Regarding Remedy, Case No. 1:16-cv-1534-JEB (and Consolidated Case Nos. 16-cv-1796 and 17-cv-267) (August 28, 2017) <https://earthjustice.org/sites/default/files/files/SRST-CRST-Reply-Brief-re-Remedy.pdf>

<sup>19</sup> Memorandum Opinion, *supra* note 15. *Infra* ¶ 10.

<sup>20</sup> “The Standing Rock and Cheyenne River Sioux Reservations are the permanent and irreplaceable homelands for the Tribes....Their core identity and livelihood depend upon their relationship to the land and environment -- unlike a resident of Bismarck, who could simply relocate if the [Dakota Access] pipeline fouled the municipal water supply, Tribal members do not have the luxury of moving away from an environmental disaster without also leaving their ancestral territory. This underscores the far-reaching effects of a DAPL spill's potential environmental

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impacts on the Tribes' historic, cultural, social, and economic interests.” US Dept. of Interior, Office of Solicitor, Memo to Secretary of Dept. of Interior: Tribal Treaty and Environmental Statutory Implications of The Dakota Access Pipeline, M-37038, Dec. 4, 2016 at p.30 Filed (and withdrawn) as Exhibit 4 to Case No. 1:16-cv-1534-JEB [https://shadowproof.com/wp-content/uploads/2017/02/document\\_ew\\_05.pdf](https://shadowproof.com/wp-content/uploads/2017/02/document_ew_05.pdf)

<sup>21</sup> Standing Rock Sioux Tribe, *Standing Rock Sioux Tribe Impacts of an Oil Spill from the Dakota Access Pipeline on the Standing Rock Sioux Tribe* (February 21, 2018) [https://www.standingrock.org/sites/default/files/uploads/srst\\_impacts\\_of\\_an\\_oil\\_spill\\_2.21.2018.pdf](https://www.standingrock.org/sites/default/files/uploads/srst_impacts_of_an_oil_spill_2.21.2018.pdf)

<sup>22</sup> UN Declaration, *supra* note 10, Articles 3, 4, 5, 11, 12, 14-19, 23-32, 36 & 46.

<sup>23</sup> Indigenous Environmental Network: <http://www.ienearth.org/urgent-appeal-for-international-observers/>

<sup>24</sup> Amnesty International, *Amnesty International USA Calls on Authorities to Protect Peaceful Protest at Dakota Access Oil Pipeline*, Aug. 30, 2016 <https://www.amnestyusa.org/press-releases/amnesty-international-usa-calls-on-authorities-to-protect-peaceful-protest-at-dakota-access-oil-pipeline-site/>

<sup>25</sup> UN DSPD, Statement from the Chair and PFII Members Dalee Dorough and Chief Edward John on the Dakota Access Pipeline

(November 4, 2016) <https://www.un.org/development/desa/indigenouspeoples/news/2016/11/statement-from-the-chair-and-pfii-members-dalee-dorough-and-chief-edward-john-on-the-dakota-access-pipeline/>

Report and Statement from Chief Edward John Expert Member of the United Nations Permanent Forum on Indigenous Issues: Firsthand observations of conditions surrounding the Dakota Access Pipeline (North Dakota, USA), November 1, 2016, <http://www.un.org/esa/socdev/unpfii/documents/2016/Docs-updates/Report-ChiefEdwardJohn-DAPL2016.pdf>

<sup>26</sup> Jack Healy, *From 280 Tribes, A Protest on the Plains*, The New York Times (Sept. 11, 2016) <https://www.nytimes.com/interactive/2016/09/12/us/12tribes.html>

<sup>27</sup> For the list of 76 state agencies present See: Thomas Dresslar, *How Many Law Enforcement Agencies Does It Take to Subdue a Peaceful Protest?* American Civil Liberties Union, Nov. 30, 2016, <https://www.aclu.org/blog/free-speech/rights-protesters/how-many-law-enforcement-agencies-does-it-take-subdue-peaceful>

<sup>28</sup> Including water cannons, sound cannons, tear gas, concussion grenades, rubber bullets, ban bag projectiles, and ferocious dogs.

Dundon v. Kirchmeier et al., First Amended Civil Rights Class Action Complaint for Damages and Injunctive Relief (Jan. 29, 2018) (“Dundon Amended Complaint”) No. 1:16-cv-406 DLH-CSM, ¶16.

Curtis Waltman, *Indiana reveals the arsenal they brought with them to Standing Rock*, Muck Rock (March 6, 2017) <https://www.muckrock.com/news/archives/2017/mar/06/indiana-reveals-arsenal-they-brought-them-standing/>

<sup>29</sup> The North Dakota Investigative and Security Board, a state administrative agency, filed a complaint against TigerSwan alleging that it was operating without a license and therefore illegally provided services to Energy Transfer Partners. *North Dakota Investigative and Security Board v. Tiger Swan* (Jun. 12, 2017), State of North Dakota, County of Burleigh, In District Court, South Central Judicial District, Verified Complaint and Request for Injunction, [https://ccrjustice.org/sites/default/files/attach/2017/11/Ex.%20A%20N.D.%20Complaint\\_0.pdf](https://ccrjustice.org/sites/default/files/attach/2017/11/Ex.%20A%20N.D.%20Complaint_0.pdf)  
The Society of Indian Psychologists issued a report expressing concern with TigerSwan’s alleged use of counterterrorism tactics against water protectors.

The Society of Indian Psychologists, *(SIP) Educational Paper Regarding the Use of Counterterrorism Tactics on Native Peoples and Allies* (February 26, 2018) <https://osf.io/72rd5/>

<sup>30</sup> “The cooperation extended beyond DAPL security and law enforcement, according to an email from Michael Futch. Instructions at times originated from Energy Transfer Partners and were sent to TigerSwan personnel, which were then forwarded to law enforcement.” C.S. Hagen, *The Laney Files, September: 2016*, High Plains Reader (December 27, 2017) <http://hpr1.com/index.php/feature/news/the-laney-files-september-2016/>

It is reported that Energy Transfer Partners paid for security costs in North Dakota and other states. “North Dakota got \$15 million on from the builder of the Dakota Access pipeline to help pay law enforcement bills related to months of protests over the project’s construction.” James Macpherson, *Dakota Access Developer Gives \$15M Toward Security Costs*, Associated Press (Sept. 28, 2017), <https://www.usnews.com/news/us/articles/2017-09-28/apnewsbreak-pipeline-firm-gives-15m-toward-security-costs>

<sup>31</sup> United Nations, *Report of the UN Special Rapporteur on the situation of human rights defenders, Situation of Human Rights Defenders*, A/72/170 (July 19, 2017) at ¶18 <https://www.protecting-defenders.org/sites/protecting-defenders.org/files/N1722075.pdf>

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<sup>32</sup> Request for Precautionary Measures, *supra* note 10, Exhibit 1 p. 5 University of Colorado Timeline; and Exhibit 17 Declaration of Ta'sina Sapa Win Smith para. ¶¶17&41.

<sup>33</sup> Request for Precautionary Measures, *supra* note 10, p. 8 citing Exhibit 17 p. 256 Declaration of Ta'sina Sapa Win Smith.

See also Democracy Now, *FULL Exclusive Report: Dakota Access Pipeline Co. Attacks Native Americans with Dogs & Pepper Spray* (Sept. 6, 2016)

[https://www.democracynow.org/2016/9/6/full\\_exclusive\\_report\\_dakota\\_access\\_pipeline](https://www.democracynow.org/2016/9/6/full_exclusive_report_dakota_access_pipeline)

<sup>34</sup> Morton County Sherriff's Department, the City of Mandan Police Department, and the Stutsman County Sheriff's Department.

<sup>35</sup> *Dundon v. Kirchemeier*, 1:16-cv-00406-DLH-CSM (D.N.D.)(Nov, 25, 2016) (Dundon Trial Pleading).

<https://waterprotectorlegal.org/wp-content/uploads/sites/7/2017/02/Dundon-Complaint-2.pdf> ¶31.

<sup>36</sup> Alleen Brown, Will Parrish, Alice Speri, *The Battle of Treaty Camp*, The Intercept (Oct. 27, 2017)

<https://theintercept.com/2017/10/27/law-enforcement-descended-on-standing-rock-a-year-ago-and-changed-the-dapl-fight-forever/>

See also: Sandy Tolan, *North Dakota pipeline activists say arrested protesters were kept in dog kennels*, Los Angeles Times (Oct. 28, 2016) <http://www.latimes.com/nation/la-na-north-dakota-pipeline-20161028-story.html>

<sup>37</sup> *Dundon v. Kirchemeier*, *supra* note 35, ¶¶ 36-43.

<sup>38</sup> Lead-filled, shotgun-fired "beanbag" rounds and rubber-plastic "sponge" rounds.

<sup>39</sup> Dundon Trial Pleading, *supra* note 35, ¶2.

<sup>40</sup> *Id.* ¶2.

<sup>41</sup> *Id.* ¶36.

<sup>42</sup> Alexis C. Beach & Rachel Lederman, Attorneys, <http://www.sfbla.com/water-protector-class-action-civil-rights-lawsuit/>

<sup>43</sup> *Id.*

<sup>44</sup> Daniela A. Media, *U.S. Army Corps Gives Eviction Notice to Dakota Access Protest Camp*, NBC News, (Feb. 3, 2017) <https://www.nbcnews.com/news/us-news/u-s-army-corps-gives-eviction-notice-dakota-access-protest-n716686>

<sup>45</sup> Members of the press have also been arrested, their equipment confiscated, and websites voicing opposition to DAPL were shut down. Low-flying helicopters, planes, and drones kept the camps under constant surveillance as cell phones were locked and protestor's phone calls were recorded. See:

Sandy Tolan, *Journalist Faces Charges after Arrest while Covering Dakota Access Pipeline Protest*, LA Times (Feb. 5, 2017) <http://www.latimes.com/nation/la-na-standing-rock-journalist-arrest-20170205-story.html>;

Chris Sommerfeldt, *SEE IT: Journalist Shot While On-Air at Standing Rock Protests*, New York Daily News (Nov. 4, 2016) <http://www.nydailynews.com/news/national/journalist-shot-on-air-standing-rock-protests-article-1.2857929>;

Committee to Protect Journalists, *Charges for journalists covering Standing Rock protests* (Feb. 17, 2017); <https://cpj.org/blog/SRock-NEW.pdf>

Alexandra Ellerbeck, *Journalists covering Standing Rock face charges as police arrest protesters* Committee to Protect Journalists (Feb. 17, 2017) <https://cpj.org/blog/2017/02/journalists-covering-standing-rock-face-charges-as.php>

Unicorn Riot, *Statement on Recent Censorship of #NoDAPL Coverage* (Sep. 20, 2016)

<https://www.unicornriot.ninja/2016/statement-recent-censorship-nodapl-coverage/>

Alleen Brown, *Arrests of Journalists at Standing Rock Test the Boundaries of the First Amendment*, The Intercept (Nov. 27, 2016) <https://theintercept.com/2016/11/27/arrests-of-journalists-at-standing-rock-test-the-boundaries-of-the-first-amendment/>

<sup>46</sup> Current as of March 6, 2018. Data provided by WPLC. This is the number of state criminal cases that have a separate case number. It may change over time if cases are dismissed due to lack of evidence and then re-charged (with new charges and case numbers). There may be several charges involved in any one case and some people may have more than one case. Four convictions are on appeal to the ND Supreme Court (and therefore are not concluded). For more information about the criminal proceedings See <https://waterprotectorlegal.org/criminal-defense/>

<sup>47</sup> Water Protector Legal Collective, Red Fawn Fallis, (2018) <https://waterprotectorlegal.org/red-fawn-fallis/>

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<sup>48</sup> Will Parish, *An Activist Stands Accused of Firing a gun at Standing Rock. It belonged to her lover-An FBI Informant*, The Intercept (December 11, 2017) <https://theintercept.com/2017/12/11/standing-rock-dakota-access-pipeline-fbi-informant-red-fawn-fallis/>

C.S. Hagen, *Infiltrated: No-DAPL Activist Hoodwinked by Paid FBI Informant, Defense Says*, High Plains Reader (January 11, 2018), <http://hpr1.com/index.php/feature/news/infiltrated-no-dapl-activist-hoodwinked-by-paid-fbi-informant-defense-says/?platform=hootsuite>

<sup>49</sup> Water Protector Legal Collective, Red Fawn Fallis, (2018) <https://waterprotectorlegal.org/red-fawn-fallis/>

<sup>50</sup> Guy E. Carmi, *Dignity Versus Liberty: The Two Western Cultures of Free Speech*, 26 B.U. Int'l L.J. 277, 300 (2008) "The United States is exceptional in its individualistic approach to free speech, and virtually all other democracies leave more room to community norms in its free speech laws. The 'community-free zone' that is characteristic of First Amendment law is unparalleled."

<sup>51</sup> IACHR hearing on *Rights to freedom of association, peaceful assembly and freedom of expression in the United States*, during the 166<sup>th</sup> period sessions (December 7, 2017)

<https://www.youtube.com/watch?v=yft7VCzxUg&t=479s&list=PL5QlapyOGhXt0BSFvgydHBu6yz2atqEN2&index=1>

<sup>52</sup> See OHCHR statement which refers to bills as "anti-protest" legislation. OHCHR, "UN rights experts urge lawmakers to stop "alarming" trend to curb freedom of assembly in the US," (March 30, 2017)

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21464&LangID>

The American Civil Liberties Union also refers to these bills as Anti-Protest laws: ALCU, Anti-Protest Bills Around the Country, ACLU (June, 23, 2017)

<https://www.aclu.org/issues/free-speech/rights-protesters/anti-protest-bills-around-country>

<sup>53</sup> For updates See International Center for Not-For-Profit Law, US Protest Law Tracker:

<http://www.icnl.org/usprotestlawtracker/?location=&status=enacted&issue=&date=&type=legislative>

"Among other things, the new laws expanded the definition of criminal trespass, and raised the penalty for a riot conviction. Though the measures were clearly in response to Standing Rock, they also reflected a much broader conservative backlash to direct action—a backlash that resulted in a wave of legislation introduced in states across the United States." Zoë Carpenter, *PHOTOS: Since Standing Rock, 56 Bills Have Been Introduced in 30 States to Restrict Protests*, The Nation (February 16, 2018) <https://www.thenation.com/article/photos-since-standing-rock-56-bills-have-been-introduced-in-30-states-to-restrict-protests/>

<sup>54</sup> HB 1293 criminalizes protests on private property where the notice against trespassing is "clear from the circumstances." North Dakota HB 1293, 65<sup>th</sup> Leg. Assembly (Jan. 3, 2017)

<http://www.legis.nd.gov/assembly/65-2017/documents/17-0650-04000.pdf>

HB 1496 increases the penalties for riot offences. North Dakota HB 1496, 65<sup>th</sup> Leg. Assembly (Jan. 3, 2017)

<http://www.legis.nd.gov/assembly/65-2017/documents/17-8158-02000.pdf>

<sup>55</sup> "Liability exemption for motor vehicle driver. Notwithstanding any other provision of law, a driver of a motor vehicle who negligently causes injury or death to an individual obstructing vehicular traffic on a public road, street, or highway may not be held liable for any damages." North Dakota H.R. 1203, 65<sup>th</sup> Leg. Assembly (Jan. 9, 2017),

<https://www.legis.nd.gov/assembly/65-2017/documents/17-0351-01000.pdf>

<sup>56</sup> On August 12, 2017, an Ohio man drove a car into a crowd of individuals demonstrating against a white nationalist gathering injuring 19 individuals and killing 32 year-old Heather Heyer. Michael Edison Hayden, M.L. Nestel, *Timeline: What led to the violence that unfolded in Charlottesville*, abc News, (Aug 14, 2017),

<http://abcnews.go.com/US/timeline-led-violence-unfolded-charlottesville/story?id=49207428>

In October of 2016, a pick-up driver plowed through a group of people during a protest in downtown Reno, Nevada hitting two protestors. The protest was put on by the American Indian Movement of Northern Nevada. Sam Levin,

*Video Shows Pickup Truck Plowing into Native American Rights Protesters*, The Guardian (Oct. 11, 2016)

[www.theguardian.com/us-news/2016/oct/11/native-american-rights-protesters-hit-by-truck-nevada](http://www.theguardian.com/us-news/2016/oct/11/native-american-rights-protesters-hit-by-truck-nevada)

<sup>57</sup> Jennifer Brooks, *North Dakota bill aimed at Standing Rock Protest*, Star Tribune (Jan. 16, 2107)

<http://www.startribune.com/north-dakota-bill-aimed-at-standing-rock-protest/410860535/>

<sup>58</sup> North Dakota Legislative Branch, Bill Actions for HB 1203 (Feb 13, 2017) <http://www.legis.nd.gov/assembly/65-2017/bill-actions/ba1203.html>

<sup>59</sup> On April 27, 2017, the North Carolina legislature, in a 67-48 vote, passed House Bill 330 ("HB 330") An Act Providing That a Person Driving an Automobile While Exercising Due Care is Immune from Civil Liability for any Injury to Another if the Inured Person was Participating in a Protest or Demonstration and Blocking Traffic in a

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Public Street or Highway at the Time of the Injury

<https://www.ncleg.net/Sessions/2017/Bills/House/PDF/H330v2.pdf>

<sup>60</sup> The Special Rapporteurs on Free Expression and Free Assembly called on U.S. lawmakers “to stop the ‘alarming’ trend of ‘undemocratic’ anti-protest bills designed to criminalize or impede the rights to freedom of peaceful assembly and expression.” They denounced the bills “as incompatible with US obligations under international human rights law and with First Amendment protections” and acknowledged that “[in] Colorado, North Dakota and Oklahoma, several bills [were] proposed as a response to the protests organized by activists and opponents of the Dakota Access Pipeline in North Dakota.” OHCHR statement, *supra* note 52.

<sup>61</sup> South Dakota Senate Bill 176, March 13, 2017 <http://sdlegislature.gov/docs/legsession/2017/Bills/SB176ENR.pdf>

<sup>62</sup> The Governor’s office announced “The reason for bringing this legislation is the protests in North Dakota and the upcoming construction of the Keystone XL pipeline in South Dakota. Governor Dugaard wants to learn from North Dakota’s experience to be prepared.” Georgetown University, The Free Speech Project, Aug. 29, 2017 <http://freespeechproject.georgetown.domains/state-and-local-government/south-dakota-legislature-senate-bill-176-2017/>

<sup>63</sup> John Hult, *Daugaard urges calm from tribes*, Argus Leader (March 14, 2017),

<https://www.argusleader.com/story/news/2017/03/14/daugaard-urges-calm-tribes/99162354/>

<sup>64</sup> *Id.*

<sup>65</sup> In Latin America, social protests in the region have been incredibly repressed and criminalized by applying anti-terrorism laws. In 2014 the Inter-American Court found that the Chilean government had violated the right to free expression of Mapuche indigenous leaders by imprisoning them under counter-terrorism laws. IACtHR, Case of Norín Catrimán et al. (Leaders, Members and Activist of the Mapuche Indigenous People) v. Chile, Judgment of May 29, 2014. (Merits, Reparations and Costs) [www.corteidh.or.cr/docs/casos/articulos/seriec\\_279\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_279_ing.pdf)  
See also Cultural Survival, *Indigenous Activist Jailed in Guatemala*, March 24, 2015

<https://www.culturalsurvival.org/news/indigenous-activist-jailed-guatemala>

See also International Network of Civil Liberties Organizations, *Take Back the Streets: Repression and Criminalization of Protest around the World*” American Civil Liberties Union, ACLU (October 2013) [www.aclu.org/report/take-back-streets-repression-and-criminalization-protest-around-world](http://www.aclu.org/report/take-back-streets-repression-and-criminalization-protest-around-world).

<sup>66</sup> Of the 281 human rights defenders killed in 25 countries in 2016, almost half had been defending their land, environment and indigenous rights. Front Line Defenders “Annual Report on Human Rights Defenders at Risk in 2016” <https://www.frontlinedefenders.org/en/resource-publication/annual-report-human-rights-defenders-risk-2016>

Historically, indigenous people’s unique expressions of their cultural identity and assertions of self-determination have been criminalized in the United States. See Nick Estes, *Fighting for Our Lives: #NoDAPL in Historical Context*, The Red Nation, (September 18, 2016), <https://therednation.org/2016/09/18/fighting-for-our-lives-nodapl-in-context/> “The anti-colonial uprising taking place in Oceti Sakowin treaty territory and spilling onto the world stage was met with violent state repression. AIM leaders were assassinated and many were imprisoned. For example, Native leader Leonard Peltier, who participated in this movement for the life and dignity of his people, to this day sits behind bars as one of the longest serving political prisoners in United States history. From 1977 to 2012 South Dakota’s prison population increased 500 percent. One-third of its prison population is Native, although Natives make up only nine percent of the total population.”

Native Americans are disproportionately in contact with the criminal justice system, are over-incarcerated, and are more likely to be killed by law enforcement than any other racial or ethnic group. Mike Males, *Who are Police Killing?* Center on Juvenile and Criminal Justice (August 26, 2014), <http://www.cjcj.org/news/8113>; See also, U.S. Census Bureau, 2010 U.S. Census, Overview of Race and Hispanic Origin: 2010, at 4 (March 2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>. See also, John Swaine, et al., *The Counted*, 2015 and 2016 datasets, The Guardian (2017) <https://www.theguardian.com/us-news/ng-interactive/2015/jun/01/about-the-counted>. See also, Elise Hansen, *The Forgotten minority in police shootings* (November 13, 2017), <http://www.cnn.com/2017/11/10/us/native-lives-matter/index.html?sr=fbCNN111317native-livesmatter0737PMStoryLink>. “Native Americans are killed in police encounters at a higher rate than any other racial or ethnic group, according to data from the Centers for Disease Control and Prevention. Yet rarely do these deaths gain the national spotlight.”

<sup>67</sup> On August 11, 2017 approximately 100 white nationalists demonstrated in opposition to the Charlottesville City Council decision to remove the statute of Confederate general Robert E. Lee from a city park. The white



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nationalists chanted “white lives matter,” and the Nazi-associated phrase “blood and soil.” Some white nationalists brawled with counter-protestors which contributed to the tension and violence that ensued the next day in a “Unite the Right” rally that resulted in 19 injuries and the killing of Heather Heyer. An independent investigation and review of the incident was very critical of law enforcement’s response. Hunton & Williams LLP, Final Report: Independent Review of the 2017 Protest Events in Charlottesville, Virginia (November 24, 2017)

[https://docs.wixstatic.com/ugd/c869fb\\_04949e939e2e440d99520dfb8400219c.pdf](https://docs.wixstatic.com/ugd/c869fb_04949e939e2e440d99520dfb8400219c.pdf)

See also: United Nations, CERD early warning and urgent action decision 1(93) (August 18, 2017),

[http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT\\_CERD\\_EWU\\_USA\\_8285\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CERD/Shared%20Documents/USA/INT_CERD_EWU_USA_8285_E.pdf)

<sup>68</sup> Beginning in March 2014, Cliven Bundy, his sons, and co-conspirators “led a massive assault against federal law enforcement officer in Bunkerville, Nevada.” Kirk Siegler, National Public Radio, *Cliven Bundy’s Arrest Caps Years Of Calls For Government To Take Action*, (Feb. 11, 2016)

<https://www.npr.org/2016/02/11/466451287/cliven-bundys-arrest-caps-years-of-calls-for-government-to-take-action>

Law enforcement did not engage Bundy and the hundreds of armed protestors because they were outnumbered and did not want to pose a risk to themselves. Criminal Complaint U.S. v. Bundy, 2:16-mj-00127-PAL, p.p. 28-31 (Feb. 11, 2016) <https://www.scribd.com/document/298998019/2-11-16-Doc-1-U-S-A-v-Cliven-Bundy-Criminal-Complaint>; On January 2, 2016, Cliven Bundy’s son Ammon Bundy amassed an armed group of mostly white protestors, demonstrating against the federal use of land by taking over a federally-owned National Wildlife Refuge. “ABC News reported at the time of the standoff that the federal government was taking a “low key” approach to dealing with the militia group. Eventually a lengthy negotiations process was set up by authorities, but protestors stayed in control of the federal land for nearly 40 days.” Catherine Thorbecke, *Oregon Siege and North Dakota Protest: Both Land Battles, But Similarities End There*, abc News (Oct. 28, 2016)

<http://abcnews.go.com/US/comparing-contrasting-protests-oregon-north-dakota/story?id=43131318>

<sup>69</sup> The ACLU submitted an open records requests to the Morton County Sheriff’s Department and North Dakota Highway Patrol to determine if there were incidents of racial profiling in policing and surveillance technologies to spy on and track protestors. They made the request in preparation for a civil lawsuit against the law enforcement agencies for First and Fourteenth Amendment violations. The request was denied and the ACLU has appealed the decision. Ltr from ACLU to Morton County Sheriff’s Department, Sept. 27, 2016

[https://www.aclund.org/sites/default/files/field\\_documents/ora\\_mortoncounty\\_dapl.pdf](https://www.aclund.org/sites/default/files/field_documents/ora_mortoncounty_dapl.pdf)

Ltr from ACLU to North Dakota Highway Patrol, Sept. 27, 2016

[https://www.aclund.org/sites/default/files/field\\_documents/ora\\_ndhwyptl\\_dapl.pdf](https://www.aclund.org/sites/default/files/field_documents/ora_ndhwyptl_dapl.pdf)

<sup>70</sup> “It is imperative that States adopt the measures necessary to secure the right of indigenous peoples and individuals to peacefully express opposition to extractive projects, as well as to express themselves on other matters, free from any acts of intimidation or violence, or from any form of reprisals. States should provide adequate training to security forces, hold responsible those who commit or threaten acts of violence, and take measures to prevent both State and private agents from engaging in the unjustifiable or excessive use of force. Additionally, criminal prosecution of indigenous individuals for acts of protest should not be employed as a method of suppressing indigenous expression and should proceed only in cases of clear evidence of genuine criminal acts. Instead, the focus should be on providing indigenous peoples with the means of having their concerns heard and addressed by relevant State authorities.” United Nations, *Report of the Special Rapporteur on the rights of indigenous peoples*, UN Doc.A/HRC/12/34/Add.8 (2009)

<http://unsr.jamesanaya.org/docs/annual/2013-hrc-annual-report-en.pdf> ¶19-21.

<sup>71</sup> IACHR *Second Report on the Situation of Human Rights Defenders in The Americas*, OEA/Ser.L/V/II, doc. 66 (2011) ¶253 <https://www.oas.org/en/iachr/defenders/docs/pdf/defenders2011.pdf>

<sup>72</sup> IACHR *Report on Indigenous Peoples, Afro-Descendent Communities and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development* ¶47-15. (December 31, 2015).

<sup>73</sup> *Id.*

<sup>74</sup> IACHR Press Release, IACHR and UN Regional Human Rights Offices Express Concern over Deteriorating Situation for Rights Defenders in the Americas (Dec. 8, 2017)

[http://www.oas.org/en/iachr/media\\_center/PReleases/2017/204.asp](http://www.oas.org/en/iachr/media_center/PReleases/2017/204.asp)

<sup>75</sup> *Id.*

<sup>76</sup> The rapporteur further explained that Indigenous communities are more vulnerable to threats and attacks because of the “lack of political and economic capital or because they belong to groups that have suffered social

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marginalization.” (¶ 20) As such the ‘work of human rights defenders in the field of business and human rights is crucial to protecting the land and the environment, securing just and safe conditions of work, combating corruption, *respecting indigenous cultures and rights* and achieving sustainable development.” (¶ 1). Special Rapporteur on the situation of human rights defenders, Michael Forst, Report on Situation of Human Rights Defenders, ¶¶ 10 & 15 (July 2017) A/72/170 <http://undocs.org/en/A/72/170>

<sup>77</sup> OHCHR, Statement of Michel Forst, Human rights defenders face worsening risks for challenging firms, UN expert warns (Oct. 25, 2017)

<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22297&LangID=E>

<sup>78</sup> *Supra*, note 3.

<sup>79</sup> *Supra*, note 2.

<sup>80</sup> David Kaye, *State Execution of the International Covenant on Civil and Political Rights*, 3 UC Irvine L. Rev. 95, 96 (2013) <https://scholarship.law.uci.edu/cgi/viewcontent.cgi?article=1082&context=ucilr>

<sup>81</sup> *UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* (March 8, 1999) Preamble, Arts. 2,9, and 12, A/RES/53/144. Although not a legally binding instrument, the Declaration on human rights defenders contains rights that are already recognized in many legally binding international human rights instruments, including the ICCPR. In addition, the Declaration was adopted by consensus by the General Assembly, which consequently represents States’ strong commitment towards its implementation.

<sup>82</sup> *Supra* note 4, ¶93.

<sup>83</sup> See also Sabrina King, *Crossing the Fossil Fuel Industry Could Now Get You Locked Up – For Decades*, ACLU (Oct., 24, 2016): “Despite the nonviolent nature of their actions, many indigenous water protectors are facing over-the-top charges that are clearly disproportionate to the actions taken against the pipeline.”

<sup>84</sup> The ACLU asked the United States Department of Justice (DOJ) to investigate “possible constitutional rights violations in the police response to peaceful protestors demonstrating against the Dakota Access pipeline.” See Ltr from ACLU to DOJ, November 4, 2016, <https://www.aclu.org/letter/aclu-standing-rock-letter-justice-department>

<sup>85</sup> For example Canada has created the “Canadian Ombudsperson for Responsible Enterprise (CORE)” to respond to human rights complaints arising from Canadian companies operating abroad, as well as a multi-stakeholder Advisory Board on Responsible Business Conduct.

<https://mailchi.mp/dist/iachr-welcomes-creation-by-canada-of-an-ombudsperson-to-oversee-canadian-companies-operating-abroad?e=01f98b5eb0>

<sup>86</sup> Foley Hoag LLP, *Public Summary of Foley Hoag LLP Report, Good Practice for Managing the Social Impacts of Oil Pipelines in the United States*, 8 (May 9, 2017) <http://www.foleyhoag.com/-/media/files/foley%20hoag/publications/ebooks%20and%20whitepapers/2017/public%20summary%20of%20foley%20hoag%20lp%20report%20good%20practice%20for%20managing%20the%20social%20impacts%20of%20oil%20pipelines%20in%20the%20united%20states.ashx>

<sup>87</sup> See Precautionary Measures Request, *supra* note 10.

<sup>88</sup> Recommendations 6-9 were adopted from proposals made by the International Center for Not for Profit-Law at the IACHR hearing on *Rights to freedom of association, peaceful assembly and freedom of expression in the United States*, *supra* note 51.

See Reuters, *Trump rescinds Obama limits on transfer of military gear to police*, (Aug. 28, 2017)

<https://www.reuters.com/article/us-usa-police-equipment/trump-rescinds-obama-limits-on-transfer-of-military-gear-to-police-idUSKCN1B81TI>

<sup>89</sup> Implementation can best be achieved by enacting local, state and/or federal legislation and issuing judicial decisions that are consistent with the state’s international human rights obligations.

<sup>90</sup> Energy Transfer Family of Partnerships and joint partners and subsidiaries including Sonoco, MarEn Bakken Company LLC, Phillips 66, and Enbridge Energy Partners L.P. “Sunoco Logistics is one of the largest pipeline operators in the United States. Energy Transfer is constructing the Dakota Access pipeline to pump crude produced at North Dakota’s Bakken shale fields to the U.S. Gulf Coast. Once completed, it will hand over the pipeline’s operation to Sunoco.” Liz Hampton, *Sunoco behind protested Dakota pipeline, tops U.S. crude spill charts*, Reuters (September 23, 2016) <https://www.reuters.com/article/us-usa-pipeline-nativeamericans-safety-i/sunoco-behind-protested-dakota-pipeline-tops-u-s-crude-spill-charts-> See also Energy Transfer, *Sunoco Logistics Partners and Energy Transfer Partners Announce Successful Completion of Merger* (April 28, 2017) <http://ir.energytransfer.com/phoenix.zhtml?c=106094&p=irol-newsArticle&ID=2267001>