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DISPROPORTIONATE POLICE MILITARIZATION AT STANDING ROCK VIOLATED INTERNATIONAL LAW

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This paper examines the law enforcement response to the 2016 Standing Rock NoDAPL¹ protests and evaluates whether this response violated international human rights law. Following an assessment of increasing militarization in U.S. policing, relevant international human rights law doctrine will be discussed. In particular, UN Human Rights declarations prohibit disproportionate armaments in policing, armed response to unlawful but unarmed protests, the deprivation of enumerated human rights, and the use of a hostilities paradigm suited to the battlefield instead of a community-caretaking focused law enforcement paradigm. The militarization at Standing Rock took the form of 76 law enforcement agencies coordinating with military contractors, both armed with less-lethal force to suppress anti-pipeline protests. This paper illustrates that the law enforcement response to the Standing Rock protests was disproportionate and in violation of customary international human rights law norms for policing, including the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990), and more broadly in the UN Universal Declaration of Human Rights (1948). These violations eroded relationships between Indigenous people, environmentalists, and the federal government, set a problematic example for foreign and domestic law enforcement departments, and endangered domestic compliance with international human rights law. In order to uphold international law, future police work should be mindful of the potential for international human rights law violation and averse to militarization disproportionate to the risks posed to officers.

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¹ The Indigenous-led protests against the Dakota Access Pipeline in 2016-2017 united through the use of the #NoDAPL hashtag, an abbreviation for "No Dakota Access Pipeline."

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I. Introduction

The Dakota Access Pipeline (DAPL) is a \$3.8 billion pipeline project which carries nearly five percent of the oil produced every day in the U.S. for 1,712 miles through unceded Lakota territory reserved in the 1868 Fort Laramie Treaty.² Its construction, opposed by Indigenous communities and an alliance of Native and non-Native water protectors, was facilitated by private security and 76 law enforcement agencies deployed alongside the National Guard.³ Law enforcement forces utilized water cannons at close range and in subfreezing temperatures, chemical gas, rubber bullets fired at heads at close range, concussion grenades, attack dogs, overwatch drones, assault rifles, and military tactics among other means to suppress the protestors.⁴ These measures were disproportionately matched to the peaceful protest employed by water protectors, who collectively did not engage in armed resistance against law enforcement. This likely resulted in the violation of international human rights law standards of domestic policing to which the U.S. is a signatory.

Clashes between law enforcement defending the interests of industry and BIPOC protesting environmental injustice are nothing new. In 1982 in North Carolina, the Warren County landfill

² NICK ESTES, OUR HISTORY IS THE FUTURE: STANDING ROCK VERSUS THE DAKOTA ACCESS PIPELINE, AND THE LONG TRADITION OF INDIGENOUS RESISTANCE 1, 2 (2019); According to the Marshal-Cohen model of Indigenous sovereignty detailed in the Cohen Handbook of Federal Indian Law's summary of the Federal Indian common law, tribes retain sovereignty over any land they have not ceded and Congress has not diminished, neither of which occurred here. See also McGirt v. Oklahoma, 140 S. Ct. 2452 (2020); Mika Soraghan, *Trail of spills haunts Dakota Access developer*, E&E News (May 26, 2020), <https://www.eenews.net/stories/1063234239>.

³ ESTES, *supra* note 2, at 54.

⁴ *Id.* at 49; See also REQUEST FOR PRECAUTIONARY MEASURES PURSUANT TO ARTICLE 25 OF THE IACHR RULES OF PROCEDURE CONCERNING SERIOUS AND URGENT RISKS OF IRREPARABLE HARM ARISING OUT OF CONSTRUCTION OF THE DAKOTA ACCESS PIPELINE, TO MR. EMILIO ÁLVAREZ ICAZA LONGORIA, EXEC. SEC. OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, 8-9 (Dec. 2, 2016) (hereinafter REQUEST FOR PRECAUTIONARY MEASURES, on file at Turtle Talk).

protests at the dawn of the environmental justice movement saw a mass law enforcement presence resulting in over 500 arrests.⁵ However, arms and armaments like MRAPs, tear gas, assault rifles chambered with less-lethal ammunition, and sonic cannons were not used.⁶ The law enforcement of that era left their faces exposed and wore shirts and ties instead of military fatigues.⁷ Yet since the 1960s, the adoption of military-style arms and armament, tactics, and hostilities paradigms popularized by Special Weapons and Tactics units and facilitated by post-Vietnam military surplus purchase programs has created a new trend in police militarization known as militarization creep. This trend is a dangerous one, as these tactics risk violating established United Nations international human rights law and conveying the symbolic and political exclusion of the communities policed in this manner.

This paper will first outline the historical context in which police militarization was enabled and how relationships formed between American police forces, extractive but often lucrative industries, and their organized opposition. The rhetorical and strategic declaration of domestic “wars” on crime, poverty, and drugs will then be discussed in relation to their effect on the policed community and the presumption that the policed community is a threat. The expansion of federal programs which facilitate the transfer of military surplus arms and armaments to law enforcement and the post-9/11 expansion of counter-terrorism resources will then be analyzed as the final substantive breakdowns of U.S. compliance with international human rights law prior to the events at Standing Rock. The NODAPL movement and the events which led to the pipeline being laid through unceded Indigenous land will then be detailed, with a particular focus on the disproportionate force, tactics, and arms and armaments used by the law enforcement coalition seeking to repress the protests.

Following the historical outline of policing and the events at Standing Rock, the norms and conventions of international human rights law will be synthesized. First, this paper will detail that international human rights law limits acceptable weaponry and ammunition in policing to prevent unwarranted injury or risk. Policing must follow a law enforcement paradigm that does not permit the a priori presumption of threat by civilians, and law enforcement should not inflict, instigate, or tolerate inhuman or degrading torture, treatment, or punishment. Then, this paper will discuss the history of the United States being cited by the Human Rights Committee for unnecessary use of dangerous less-lethal weaponry. These international standards will then be contrasted with the law enforcement actions taken at Standing Rock in the course of repressing the NODAPL movement, to show that the actions taken by the U.S. law enforcement coalition violated multiple norms and conventions of international human rights law.

⁵ ENVIRONMENTAL JUSTICE HISTORY, U.S. DEP'T OF ENERGY, OFFICE OF LEGACY MGMT, <https://www.energy.gov/lm/services/environmental-justice/environmental-justice-history> (last visited Feb. 17, 2021).

⁶ *Real People – Real Stories, Afton, NC* (Warren County), UNC Exchange Project 1, 3 (last visited Feb. 17, 2021), <https://exchangeproject.unc.edu/wp-content/uploads/sites/18406/2018/08/Real-People-Afton-summary-07-0320.pdf>; MRAPs are Mine Resistant Ambush Protected military vehicles, the armored tactical vehicles used by the US military and SWAT teams.

⁷ *Id.*

II. Historical Context

A. Historic Militarization of the American Police Culture and Organizational Structure

Police militarization, demonstrated by the adoption of military-style arms and armaments, tactics, and hostilities paradigms⁸, has accelerated dramatically in the U.S. over the last 70 years – although the trend is not a new one. As defined by Lieblich and Shinar, “Militarization is the process by which an organization adopts the operation mode of a military or embraces military values and culture. Accordingly, law enforcement has borrowed its primary problem-solving tools from the military.”⁹ South Carolina slave codes authorized the formation of the first American policing force in 1712.¹⁰ The structure of volunteer community watchmen led by an independently elected sheriff, traditionally relied upon in the Anglo-American justice system, was replaced by patrolmen with a “beat.”¹¹ Elsewhere in the Union, the first policing forces formed in response to the “Indian problem.”¹² Indian-fighting militias in colonial settlements competed with tribal nations to assert their police power over land, people, and resources.¹³ However, likely because of the colonists’ experience under the military occupation of the British government, there was resistance in Anglo-American culture to the regularization of domestic armed forces for the better part of a century after the Revolutionary War. As a result, police forces were generally still composed of volunteer units run by the community.¹⁴

The tides shifted in the mid-1800s when constables and regularized militias began to take on a more established role.¹⁵ The first bureaucratically organized police force was founded in New York City in 1845.¹⁶ At this crucial juncture politicians and law enforcement leadership introduced uniforms, paramilitary organizational structure, and salaries to U.S. police.¹⁷ By 1864, Chicago, Detroit, Newark, Baltimore, Philadelphia, New Orleans, Cincinnati, and several mid-sized and small cities had adopted New York City’s model.¹⁸ This early era of increased militarization paralleled the growth of the urban Polish and Italian immigrant working class. The purpose of the police forces were twofold. First, police “socialize[d]” immigrants through the enforcement of “public disorder” laws, which criminalized loud celebrations and organized protests.¹⁹ Second, police combatted anti-industrial organized labor which was threatening the profits of the Northeastern elite.²⁰ Police were active in suppressing protests, stopping food riots, halting labor organizing, combating anti-industrial machine breaking, and interfering with other direct labor

⁸ See Lieblich, et al., *The Case Against Police Militarization*, 23 MICH. J. RACE & L. 105, 131 (2018). As opposed to the law enforcement paradigm regulated by international human rights law and suited for domestic policing, the hostilities paradigm presumes the target to be an a priori threat and is only suited to multinational military conflicts.

⁹ *Id.* at 109.

¹⁰ SUSIE BERNSTEIN, ET AL., *THE IRON FIST AND THE VELVET GLOVE: AN ANALYSIS OF THE U.S. POLICE* 20 (2nd ed. 1977).

¹¹ *Id.*

¹² *Id.* at 21.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 23.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 25.

²⁰ *Id.* at 24.

actions, as well as protecting scabs,²¹ jailing the unemployed as “tramps,” and strike breaking.²² Police often went as far as setting up tactical headquarters within the offices of strike-bound corporations to support the management.²³

In the South, the growth of policing followed the post-Reconstruction “Jim Crow” laws, which reintroduced the old patrols with the trappings of the Northern organized police forces.²⁴ However, the focus of Southern police was more squarely on repressing the newly liberated Black populations instead of the immigrant working class.²⁵ In 1881, the police commissioner of Atlanta instructed officers to “Kill every damned n***** you have a row with.”²⁶ The Southwest, which was being colonized by opportunist settlers and veterans of the Civil War, generally followed the Southeast’s policing culture. In this context, Stephen F. Austin established the Texas Rangers to “Meet the outlaw breed of the three races, the Indian warrior, Mexican bandit, and American desperado on the enemy’s ground and deliver each safely within the jail door or cemetery gate.”²⁷ Like in the North and Southeast, these newly-organized paramilitary forces generally worked at the behest of local elites.²⁸ An essential function of the Rangers was protecting cattle herds owned by the emerging investor class of the Southwest from cattle rustlers and raids.²⁹ The Texas Rangers aligned themselves so closely with the Southwestern elites that the Spanish-speaking community in Texas frequently called the Rangers “rinches de la Kineña” or “Rangers of the King Ranch,” because cattle baron Richard King and his fellow landowning ranchers often called in the Rangers to settle their own disputes.³⁰

B. Wars on Citizens and the Presumption of Threat

As demonstrated, the trend of increasing militarization in policing can be observed beginning in the mid-1800s as traditional community watch forces, focused on fighting threats external to settler communities like Indigenous populations and runaway slaves, were reorganized into paramilitary police forces focused on policing the community itself.³¹ As described by Lieblich and Shinar, the key issue with police militarization is not simply that it brings about violence or abuse of authority. But rather, militarized police presume citizens to be threats and “the deployment of militarized police marks the policed community as an enemy, and thereby excludes it from the body politic.”³² Even still, the degree to which police adopted military-grade weapons, artillery, tactics, and presumption of threat was limited compared to the following century.

In the modern era, the exclusionary capacity of militarized police targeting a community can be easily observed from the 1960s onward. Police militarization spiked in response to

²¹ Scabs were non-union workers who took the job of unionized workers on strike, undermining the political capacity of the labor movement by enabling corporations to ignore the strikes.

²² BERNSTEIN, *supra* note 10, at 24.

²³ *Id.* at 25.

²⁴ *Id.* at 21.

²⁵ *Id.* at 26.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 23.

³² Lieblich, *supra* note 8, at 105.

Johnson's "War on Crime" and Nixon's subsequent "War on Drugs."³³ In his paper deconstructing natural disaster response, Pidot noted that the language used to describe events shapes understanding and affects responses.³⁴ Reliance on the metaphor of war can trigger a "maladaptive response" due to the rhetorical distortion of reality, where police forces behave as if citizens are opposition forces rather than civilian constituents.³⁵ In the context of these presidentially-declared wars on American citizens, and in response to the "Watts Uprising"³⁶ protesting police brutality, LAPD Chief Daryl Gates established the first modern Special Weapons and Tactics or "SWAT" unit in 1965.³⁷ Chief Gates formed the unit in cooperation with the U.S. Marine Corps and integrated guerilla warfare principles popularized by the ongoing Vietnam War.³⁸ A phenomenon coined by Lieblich and Shinar as "militarization creep" can be observed in the following years.³⁹ Once a police force begins using militarized forces for an area of concern like drug trafficking, these techniques and armaments ultimately become integrated into new areas like counter-terrorism and day-to-day police work.⁴⁰ Further, the increasing call-out rates for SWAT units do not correspond to a rise in violent crime.⁴¹ Despite fears by the framers of the Constitution that standing armies would conduct policing duties, today's American SWAT teams commence armed invasions of private homes more than 100 times per day, primarily to enforce laws against consensual crimes such as the purchase of illicit drugs.⁴² This trend culminated in the public eye during the so-called Battle of Seattle in 1999, a police assault of a protest of the World Trade Organization conference in the city.⁴³ This was the first major event in which Americans saw a massed and militarized police force in body armor and fatigues, holding military weapons, launching chemical munitions, and driving armored vehicles while fighting against American citizens.⁴⁴ The militarized response to protests by the impoverished and by black, Indigenous, and other people of color effectively exclude these populations from equal participation in the body politic by defining them as a threat worthy of military action.

C. Expansion of Military-Style Arms and Armaments for Civilian Policing

The police's military-style armaments at the Battle for Seattle and later at Standing Rock were made possible by a half-century of legislation and executive action that funneled military-style weapons and training to police units.⁴⁵ Almost six years after the end of the Vietnam War, Congress passed the Military Cooperation with Law Enforcement Act of 1981, authorizing the military to make equipment, information, research facilities, and military bases accessible to civilian police.⁴⁶ A decade later in 1991, Congress passed the National Defense Authorization Act

³³ *Id.* at 115.

³⁴ Justin Pidot, *Deconstructing Disaster*, 2013 BYU L. REV. 213, 224 (2013).

³⁵ *Id.* at 225.

³⁶ The Watts Uprising or Watts Riots followed allegations of police brutality in the course of an arrest. The events resulted in 34 deaths and substantial property damage. 14,000 California National Guardsmen were deployed.

³⁷ Lieblich, *supra* note 8, at 115.

³⁸ *Id.* at 117.

³⁹ *Id.* at 127.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Radley Balko, *Rise of the Warrior Cop*, 99 ABA J. 43, 48 (2013).

⁴³ Lieblich, *supra* note 8, at 121.

⁴⁴ *Id.*

⁴⁵ *Id.* at 116.

⁴⁶ Military Cooperation with Civilian Law Enforcement Officials, 10 U.S.C. §§ 374-378 (Suppl. 2 1982) (current version at 10 U.S.C. § 274 (2016)).

for Fiscal Years 1990-1991, permitting the transfer of surplus Department of Defense equipment to civilian police forces.⁴⁷ In 1996, Congress passed 32 U.S.C. § 112 permitting police departments to purchase military equipment from the National Guard at subsidized rates, including weapons and surveillance technology.⁴⁸ The federal government has disbursed \$7.4 billion in military equipment to civilian police departments since the program's inception.⁴⁹ Additionally, between 2001 and 2011, the Department of Homeland Security gave \$34 billion in anti-terror grants. Many grants went to places that were unlikely to harbor conventional terrorist threats but were also rich in fossil fuel exploitation, such as Fargo, North Dakota and Canyon County, Idaho.⁵⁰ While the Obama Administration put in place minor constraints on military equipment acquisition by civilian police,⁵¹ the next President promptly repealed those constraints.⁵² And yet, the suppression of NoDAPL protests at Standing Rock occurred entirely within the period that this Executive Order had legal force—a testament to the Executive Order's ineffectiveness at constraining police militarization.

D. Description of the Standing Rock NoDAPL Pipeline Protests

The Dakota Access Pipeline (DAPL) is a \$3.8 billion pipeline project, the controlling interest owned by Energy Transfer Partners, which carries oil 1,712 miles through unceded Lakota territory reserved in the 1868 Fort Laramie Treaty.⁵³ Immediately upstream of the Standing Rock reservation, the pipeline crosses under the Missouri River (the *Mni Sose* in Lakota), threatening several tribal nations' water supplies.⁵⁴ Originally, the pipeline was set to cross the river upstream from Bismarck, a city that is over 90% White. However, the Army Corps of Engineers took the initiative to reroute the project downstream to the border of an 84 percent Native residential area.⁵⁵ All the same, environmental justice studies conducted by the Army Corps of Engineers found no "disproportionate risk to a racial minority."⁵⁶ The new path through several reservations cut through almost 380 archaeological sites, such as burials, with 60 archaeological sites alone disturbed along the confluence of the Cannonball and Missouri Rivers.⁵⁷ According to the National Historic Preservation Act, Section 106, the implicated land should have been defined as ancestral territory, which would require consultation with the Standing Rock tribe about potential legal issues.⁵⁸ The Standing Rock Constitution also reserved jurisdiction over all rights of way, waterways, watercourses, and streams running through any part of the reservation.⁵⁹ Yet, because

⁴⁷ National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, 104 Stat. 1485.

⁴⁸ Drug Interdiction and Counter-Drug Activities, 32 U.S.C. § 112.

⁴⁹ Def. LOGISTICS AGENCY, LAW ENF'T SUPPORT OFFICE, <https://www.dla.mil/DispositionServices/Offers/Reutilization/LawEnforcement.aspx> (last visited Nov. 15, 2020).

⁵⁰ Lieblich, *supra* note 8, at 120.

⁵¹ Exec. Order 13,688, 80 FED. REG. 3451 (Jan. 16, 2015).

⁵² Lieblich, *supra* note 8, at 124-5.

⁵³ Soraghan, *supra* note 2; ESTES, *supra* note 2, at 2.

⁵⁴ *Id.*

⁵⁵ *Id.* at 11.

⁵⁶ *Id.*

⁵⁷ *Id.* at 43.

⁵⁸ National Historic Preservation Act, Pub. L. No. 89-665, 106 Stat. 4763. *See also* the United Nations Declaration on the Rights of Indigenous Peoples, arts. 19, 28, 29 (2007), which instructs states to obtain the free, prior, and informed consent of Indigenous communities prior to such actions, provides the right to redress land, territories, or resources taken without free, prior, and informed consent, and specifically includes language intended to protect Indigenous communities from the storage or disposal of hazardous materials within their land.

⁵⁹ ESTES, *supra* note 2, at 44.

of a series of dams built along the Missouri River in the course of the Pick-Sloan⁶⁰ program of the 1950s and 1960s, the Army Corps of Engineers claimed sole jurisdiction over the river and shoreline despite lacking Congressional authorization to extinguish Indigenous jurisdiction over the river.⁶¹

Tribal citizens and allies, identifying as water protectors, began to organize in earnest in opposition to the pipeline's construction in early 2016. The water protectors were concerned with the destruction of sacred sites, the imposition of man camps nearby compounding the Missing and Murdered Indigenous Women (MMIW) crisis, and the pollution of the water depended upon by tribal nations.⁶² Indeed from 2010-2016, Sunoco Logistics (the operators of DAPL) had more than 200 of their pipelines leak.⁶³ Within just the first six months of operation, Dakota Access Pipeline had already leaked five times.⁶⁴

The growing resistance movement impeding the progress of the pipeline led North Dakota Governor Jack Dalrymple to declare a state of emergency on August 19, 2016. This declaration enabled Dalrymple to deploy the National Guard and invoke Emergency Management Assistance Compact powers to permit state, municipal, and federal law enforcement agencies to share equipment and personnel during community disorders, insurgency, or enemy attack.⁶⁵ On September 3, 2016, excavation began, unearthing Indigenous remains.⁶⁶ Water protectors pushed down the fences surrounding the site and threw themselves in front of the bulldozers.⁶⁷ Private security sprayed CS gas and sicced attack dogs on the water protectors.⁶⁸ The footage prompted allies to gather from around the U.S.⁶⁹ At its peak, the largest resistance camp was the tenth largest city in the state of North Dakota, with a population of 10,000 to 15,000 water protectors in residence for several months.⁷⁰ Alcohol and drugs were strictly prohibited at the camp, as was the non-consensual photography of Indigenous ceremonies and persons.⁷¹ Water protectors established a school to teach the children at the camp and a communal kitchen to feed the water protectors in residence.⁷²

In response, 76 law enforcement agencies deployed alongside the National Guard and several private security firms.⁷³ The agencies that arrived were some of the largest recipients of Department of Defense surplus military equipment.⁷⁴ For example, the Lake County Sheriff's Office of Indiana, which sent four deputies to suppress pipeline resistance, collected \$1.5 million in military equipment, including 100 assault rifles and two armored trucks.⁷⁵ In his excess of

⁶⁰ The Pick-Sloan Missouri Basin relied on the appropriation of tribal lands to facilitate the construction of dams along the Missouri River in the states of North Dakota, South Dakota, and Nebraska.

⁶¹ ESTES, *supra* note 2, at 44-45.

⁶² *Id.* at 32-43.

⁶³ *Id.* at 43.

⁶⁴ *Id.*

⁶⁵ *Id.* at 2.

⁶⁶ *Id.* at 49.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 7.

⁷¹ *Id.* at 58.

⁷² *Id.* at 59-60.

⁷³ *Id.* at 54.

⁷⁴ *Id.* at 54-55.

⁷⁵ *Id.*

quality training, one of their deputies managed to shoot himself in the foot with a military surplus assault rifle during the protests.⁷⁶

Of the private security firms retained by Energy Transfer Partners, TigerSwan took the dominant role. TigerSwan is a Department of Defense and Department of State contractor that retains offices in Afghanistan, India, Iraq, Japan, Jordan, Latin America, Saudi Arabia, and the U.S.⁷⁷ Retired Army Colonel James Reese, who was a commander in the elite Army special ops unit, the Delta Force, founded TigerSwan during the height of the Iraq War.⁷⁸ TigerSwan coordinated with the federal intelligence group (the “intel group”), composed of agents from the Federal Bureau of Investigation (FBI), Department of Homeland Security (DHS), Department of Justice (DOJ), Federal Marshals, Bureau of Indian Affairs (BIA), and state and local police, often based out of the local DHS fusion center.⁷⁹ The intel group integrated closely with private security, and they went as far as using a live video feed from a private DAPL security helicopter.⁸⁰ National Security Intelligence Specialist Terry Van Horn of the U.S. Attorney’s Office acknowledged direct access to the helicopter video feed, which was tracking protestors’ movements during a demonstration.⁸¹ TigerSwan also sent the intel group regular reports mirroring their own internal daily situation reports.⁸² In one report, TigerSwan discusses a meeting with investigators from the North Dakota Attorney General’s Office.⁸³ By September 13, 2016, ten days after the beginning of excavation for the pipeline, TigerSwan had a liaison inside the law enforcement joint operation command in North Dakota regularly issuing intelligence briefings.⁸⁴ TigerSwan also had representatives on a conference call with the FBI, DHS, Joint Terrorism Task Force, Iowa Department of Emergency Services, Iowa Department of Homeland Security, and Iowa Department of Wildlife.⁸⁵ TigerSwan briefings routinely described water protectors using military and tactical language, discussing their “stockpiling signs” and the “caliber” of paintball pellets, calling protestors “terrorists,” direct actions “attacks,” and resistance camps “battlefields” and “battlespaces.”⁸⁶ A September 12, 2016, Tiger Swan situation report noted that construction workers were “over-watched by a predator [drone] on loan to the JEJOC from Oklahoma,” although an anonymous TigerSwan contractor suggested that the referenced technology was likely a Phantom 4 and not a Predator drone.⁸⁷ One TigerSwan report features an operative describing an effort to “find, fix, and eliminate” threats to the pipeline, which echoes the “find, fix, finish” terminology used in the U.S. military’s targeted drone assassination campaign.⁸⁸ In addition to providing intelligence briefings, TigerSwan attempted to mount a counter-information campaign on social media and sent personnel to infiltrate the NoDAPL resistance camps.⁸⁹ An October 3,

⁷⁶ *Id.*

⁷⁷ Brown, et al., *Leaked Documents Reveal Counterterrorism Tactics Used at Standing Rock to ‘Defeat Pipeline Insurgencies’*, INTERCEPT (May 27, 2017), <https://theintercept.com/2017/05/27/leaked-documents-reveal-security-firms-counterterrorism-tactics-at-standing-rock-to-defeat-pipeline-insurgencies/>.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

2016, internal TigerSwan situation report mentioned, “Exploitation of ongoing native versus non-native rifts, and tribal rifts between peaceful and violent elements is critical in our effort to delegitimize the NoDAPL movement.”⁹⁰ At the same time, law enforcement placed a military checkpoint on the only highway in and out of Standing Rock, stifling business to the Prairie Knights Casino (the major source of revenue for the Standing Rock tribal government and many of its citizens) and forcing traffic in and out of Standing Rock to route around the barricade for over an hour to access groceries and supplies in town.⁹¹

The conflict came to a head on October 27, 2016, when a security officer wearing a red bandana made his way behind the water protectors’ lines in an unfamiliar white pickup and tried to run the resistance barricade from behind.⁹² The security officer drove his truck right towards the Oceti Sakowin camp, where elders and children had stayed back from the frontlines of the resistance, with no visible identification and an assault rifle in the passenger seat.⁹³ Members of the water protectors’ camp security, Mike Fasig and Israel Hernandez, spotted the truck careening towards the camp and used their vehicle to ram his truck off of the road into a pond.⁹⁴ Water protectors surrounded the security officer and convinced him to leave peacefully.⁹⁵ That night, militarized law enforcement forces raided the 1851 Treaty Camp.⁹⁶

The 1851 Treaty Camp raid was the largest mobilization of U.S. military and police forces in the state since the 1890 Wounded Knee Massacre when nearly half of the state’s standing military was deployed under the command of General George Armstrong Custer.⁹⁷ In order to clear one of the last obstacles before the Dakota Access Pipeline could cross the Missouri River, police pushed forward from the plains while deploying pepper spray, tasers, LRAD sound cannons, and batons against water protectors.⁹⁸ Some water protectors at the camp began throwing pieces of rubble from the ground in response, while others shouted to remain non-violent.⁹⁹ To delay the raid, water protectors on horseback drove a herd of buffalo towards the law enforcement officers on the frontline.¹⁰⁰ Assault rifle-toting law enforcement in camouflage fatigues chased the riders across the plains and detained them at gunpoint.¹⁰¹ Law enforcement officers dragged half-naked elders from sweat lodges, tasered a water protector in the face, showered others with CS and tear gas, and deafened water protectors with LRAD sound cannons.¹⁰² That night, 142 water protectors

⁹⁰ *Id.*

⁹¹ ESTES, *supra* note 2, at 4.

⁹² Brown et al., *The Battle of Treaty Camp*, INTERCEPT (Oct. 27, 2017, 5:30 PM), <https://theintercept.com/2017/10/27/law-enforcement-descended-on-standing-rock-a-year-ago-and-changed-the-dapl-fight-forever/>.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ ESTES, *supra* note 2, at 53. Water protectors named this camp the 1851 Treaty Camp, one of several camps of water protectors obstructing the planned pipeline path, because they formed the camp in unceded Native land confirmed as Lakota territory by the later-violated 1851 Fort Laramie Treaty.

⁹⁷ *Id.* at 54.

⁹⁸ Brown et al., *supra* note 94.

⁹⁹ *Id.* at Fig. 10 (“Pipeline protestors throw objects at law enforcement agents, who respond with pepper spray.”). LRAD stands for Long Range Acoustic Device.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at Fig. 15 (“Security footage shows horseback riders facing off with police and private security in ATVs, trucks, and helicopters.”).

¹⁰² ESTES, *supra* note 2, at 53-54.

were arrested and marked with a black number on their forearm¹⁰³ and held on the highway for hours before being stripped down and led onto buses—some barefoot and in their underwear.¹⁰⁴ They were kept overnight in metal dog kennels in Morton County while being processed for shipment to various jails across the state.¹⁰⁵ When law enforcement returned personal belongings and ceremonial objects, some camp residents found them soaked in urine.¹⁰⁶ Only one water protector's firearm was discharged when she was tackled to the ground in the course of her arrest.¹⁰⁷ Court proceedings later revealed that the gun Red Fawn Fallis was accused of discharging was owned by a paid FBI informant Heath Harmon who had engaged in a relationship with the accused, raising further questions about the proportionality of the arms utilized by police forces.¹⁰⁸ President Obama, when asked about the police brutality a week later, condemned “both sides.”¹⁰⁹

A few weeks later on November 20, 2016, at the Backwater Bridge, law enforcement launched another brutal assault on a day water protectors remember as “Backwater Sunday.”¹¹⁰ Water cannons laced with pepper spray mounted on MRAP tanks blasted water protectors and law enforcement launched gas canisters directly at water protectors as if they were projectile weapons.¹¹¹ Temperatures were below freezing and many water protectors were treated for hypothermia by camp medics.¹¹² Police also fired beanbag rounds, rubber bullets, and flash-bang grenades.¹¹³ Over 200 water protectors were injured, including a Navajo woman who lost an eye and a White ally whose arm was nearly blown off by a flash-bang crowd control grenade.¹¹⁴ The Chairmen of the Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe, and Yankton Sioux Tribe, as well as the Director of the American Indian Law Clinic and the International Program Managing Attorney of Earthjustice, sought to make the international community aware of the conflict between U.S. law enforcement actions and the nation's agreement to abide by U.N. standards and jointly filed a Request for Precautionary Measures with the Inter-American Commission on Human Rights due to the “harassment and violent suppression of water defenders.”¹¹⁵ On September 10, 2020, Judge Daniel Traynor deferred ruling on a motion for summary judgment in *Dundon v. Kirchmeier*¹¹⁶, allowing a federal class action civil rights lawsuit on behalf of all injured on Backwater Sunday to proceed to discovery against Sheriff Kirchmeier and other officials.¹¹⁷

¹⁰³ *Id.*

¹⁰⁴ Brown et al., *supra* note 93.

¹⁰⁵ *Id.*

¹⁰⁶ ESTES, *supra* note 2, at 53-54.

¹⁰⁷ Will Parrish, *Standing Rock Activist Accused of Firing Gun Registered to FBI Informant is Sentenced to Nearly Five Years In Prison*, INTERCEPT (July 13, 2018), <https://theintercept.com/2018/07/13/standing-rock-red-fawn-fallis-sentencing/>.

¹⁰⁸ *Id.*

¹⁰⁹ ESTES, *supra* note 2, at 54.

¹¹⁰ *Id.* at 55.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ REQUEST FOR PRECAUTIONARY MEASURES, *supra* note 4, at 7.

¹¹⁶ A federal civil rights lawsuit filed by water protectors injured by police brutality on Backwater Sunday.

¹¹⁷ Order Converting Defs.' Mot. to Dismiss Into Mot. for Summ. J. and Deferring Ruling on the Same, Granting Pls.' Mot. to Conduct Disc., And Finding As Moot Pls.' Mot. for Hr.', 1, *Dundon v. Kirchmeier*, No. 1:16-cv-406 (D.N.D.).

By the time the Oceti Sakowin camp, last of the resistance camps, was evicted in February of the following year, law enforcement had arrested over 832 water protectors and imprisoned four of them.¹¹⁸ Hundreds of living water protectors had been injured, hundreds of their ancestors had been unearthed, and a new pipeline, operated by a company with a history of hundreds of leaks, ran beneath the river sacred to the life and religion of the Lakota people.

III. International Human Rights Law as Implicated by Police Militarization

A. Applicable International Law

The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials in 1990.¹¹⁹ The UN adopted this resolution a decade after the United Nations Code of Conduct for Law Enforcement Officials of 1979.¹²⁰ Although regarded as soft law and not binding per se, the principles in these documents provide practical consensus guidelines for the use of force by member states towards civilians.¹²¹ These resolutions are regarded as binding to the degree by which they have risen to the status of “customary law” which “results from a general and consistent practice of states that they follow from a sense of legal obligation.”¹²²

The UN Code of Conduct for Law Enforcement Officials specifies parameters for acceptable execution of law enforcement duties. It set the stage for subsequent UN resolutions regarding the use of force continuum in a law enforcement paradigm. In particular, it makes clear that, “[l]aw enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.”¹²³ Further, the Code of Conduct establishes that law enforcement officials may neither “inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment” nor invoke “exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification.”¹²⁴

Building on the Code of Conduct, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials lays down a standard use of force continuum and limitations on weapons usage.¹²⁵ The Basic Principles specify that, “Whenever the lawful use of

¹¹⁸ ESTES, *supra* note 2, at 64.

¹¹⁹ G.A. Res. 45/166, at 279 (Dec. 18, 1990).

¹²⁰ G.A. Res. 34/169, annex, Code of Conduct for Law Enforcement 185, 186–187 (Dec. 17, 1979) (hereinafter Code of Conduct).

¹²¹ Frederic Weisenbach, *Uncertainty on Somalia's Beaches—The Legal Regime of Onshore Anti-Piracy Operations*, 19 J. CONFLICT & SEC. L. 85, 88 (2014).

¹²² CUSTOMARY INT’L LAW, LEGAL INFORMATION INST.,

https://www.law.cornell.edu/wex/customary_international_law (last visited Nov. 15, 2020); These resolutions are the relevant material for considering police militarization but are not the only elements of international law implicated by the U.S. appropriation of the Missouri River watershed or the law enforcement response to the NODAPL anti-pipeline protests; *See also* G.A. Res. 61/295, annex, United Nations Declaration on the Rights of Indigenous Peoples, arts. 10, 19, 28, 29, 32 (Sept. 13, 2007), which requires free, prior, and informed consent before appropriation of traditionally owned or occupied land or the storage or disposal of hazardous material in the same and guarantees Indigenous People the right to redress when consent does not occur.

¹²³ Code of Conduct, *supra* note 121, at art. 3.

¹²⁴ *Id.* at art. 5.

¹²⁵ Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, 112–116, U.N. Doc. A/CONF.144/28/Rev.1, annex (1991) (hereinafter Basic Principles).

force and firearms is unavoidable, law enforcement officials shall: (a) Exercise restraint... and act in proportion to the seriousness of the offense... (b) Minimize damage and injury... (c) Ensure that assistance and medical aid are rendered. . . at the earliest possible moment, (d) Ensure that relatives or close friends of the injured... are notified at the earliest possible moment.”¹²⁶ Further, the Basic Principles specify that exceptional circumstances “may not be invoked to justify any departure from these basic principles.”¹²⁷ Especially critical to the analysis of law enforcement actions at Standing Rock, the resolution states that, “[i]n the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary.”¹²⁸ Further, the Basic Principles stipulate that the use of particular firearms and ammunition should be prohibited if it causes “unwarranted injury or present[s] an unwarranted risk.”¹²⁹ While the Basic Principles do not provide a definition of firearms, a more recent General Assembly resolution known as the Firearms Protocol defines a firearm as “any portable barreled weapon that expels, is designed to expel or may be readily converted to expel a shot, bullet, or projectile by the action of an explosive, excluding antique firearms or their replicas.”¹³⁰ This definition is inclusive of riot control weapons and ammunition like rubber bullets and riot control grenade launchers. In fact, the Humans Rights Committee has already cited the United States for the use of police brutality and the overuse of less-lethal weapons like tasers.¹³¹ The committee stated that the potentially life-threatening less-lethal weapon should only be used in situations where greater (or lethal) force would otherwise have been justified, and the committee explicitly states that the United States’ policies are not in line with the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.¹³²

B. International Human Rights Law, as Opposed to International Humanitarian Law, Governs Law Enforcement Action.

Two distinct international legal regimes govern when a government is engaging in either international armed conflicts or domestic law enforcement.¹³³ International human rights law governs law enforcement practice, while international humanitarian law governs the waging of war.¹³⁴ As described in the documents mentioned above, the international human rights law enforcement paradigm requires that State agents limit force to absolute necessity.¹³⁵ Three principles govern the analysis of State use of force: necessity (must be absolute), proportionality (potentially lethal force is only proportional when an individual is posing an imminent threat of death or serious injury), and precaution (law enforcement must take all precautions to avoid the

¹²⁶ *Id.* at ¶ 5.

¹²⁷ *Id.* at ¶ 8.

¹²⁸ *Id.* at ¶ 13.

¹²⁹ *Id.* at ¶ 11(c).

¹³⁰ G.A. Res. 55/255, annex, Protocol Against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, art. 3(a) (May 31, 2001).

¹³¹ U.N. Hum. Rts. Comm., *Consideration of Reports Submitted by States’ Parties Under Article 40 of the Covenant: Concluding observations of the Human Rights Committee*, ¶ 30, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006).

¹³² *Id.*

¹³³ GLORIA GAGGIOLI, *THE USE OF FORCE IN ARMED CONFLICTS: INTERPLAY BETWEEN THE CONDUCT OF HOSTILITIES AND LAW ENFORCEMENT PARADIGM* 1, 6 (Gloria Gaggioli ed., 2013).

¹³⁴ *Id.* at 6-7.

¹³⁵ *Id.* at 7.

use of force).¹³⁶ Less-lethal weaponry is only permitted within a continuum of proportional force.¹³⁷

This human rights-focused law enforcement paradigm applies so long as a state is not engaged in international armed conflicts.¹³⁸ Even the “war on terror” cannot be considered outside of the international human rights law enforcement paradigm unless it can be contextualized as a state on state international armed conflict.¹³⁹ Similarly, the UN Human Rights Committee engaged in a quasi-adjudicative function resolved that even persons suspected to be part of an armed and violent cartel in Colombia must still be treated as civilians within the law enforcement paradigm.¹⁴⁰ The evaluation of the use of force within the international human rights law enforcement paradigm focuses on the degree to which the State decision was made arbitrarily.¹⁴¹ Unless the force used is “strictly necessary and does not exceed the minimum to achieve a legitimate purpose. . . the person in question constitutes a threat at that very moment. . . the employed force [is] proportional to the danger present, and finally precautions [are] taken to avoid the use of force—the force is not permitted even when targeting an armed or potentially armed civilian.”¹⁴²

In addition, the very use of military-style weapons can convey a presumption that civilians are considered an a priori threat.¹⁴³ While this is acceptable within the hostilities paradigm that governs international armed conflict, the presumption of threat by civilians within domestic law enforcement is not permissible.¹⁴⁴ As asserted by Lieblich and Shinar, “the mere deployment of combat-ready police conveys to the community that it must be threatening; otherwise such forces would have not been needed to begin with.”¹⁴⁵ In their model, whenever police, through weapons, equipment, or uniform, are perceived as equipped for combat, “a new friend/enemy distinction emerges, whereby the policed community is excluded from the political collective.”¹⁴⁶

There are several effects arising from such a perversion of the law enforcement paradigm. Not only does the use of combat-ready arms and armaments convey an exclusionary effect on groups of citizens, it can also have a chilling effect on popular dissent.¹⁴⁷ By policing under the assumption of insecurity, a State admits its inability to provide security, and the State’s actions become “an authoritative statement of the law’s lack of authority.”¹⁴⁸ In sum, the use of disproportionate arms and armaments, such as a militantly armed response to unarmed protest, the use of a hostilities paradigm suited for international armed conflict instead of a law enforcement paradigm, and the deprivation of prisoners’ rights all constitute violations of international human

¹³⁶ *Id.* at 8-9.

¹³⁷ *Id.* at 45.

¹³⁸ David Weissbrodt, *The Role of the Human Rights Committee in Interpreting and Developing Humanitarian Law*, 31 UNIV. PA. J. INT’L L. 1185, 1229 (2010).

¹³⁹ *Id.* at n. 172.

¹⁴⁰ Rep. of the Human Rights Committee on Its Thirty-Seventh Session., U.N. Doc. Supp. No. 40 (A/37/40), at ¶ 13.2, at 137 (March 31, 1982).

¹⁴¹ Weisenbach, *supra* note 122, at 89.

¹⁴² *Id.* at 89.

¹⁴³ Lieblich & Shinar, *supra* note 8, at 131.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 133.

¹⁴⁶ *Id.* at 143.

¹⁴⁷ *Id.* at 150.

¹⁴⁸ *Id.* at 151 (quoting PETER RAMSAY, *THE INSECURITY STATE: VULNERABLE AUTONOMY AND THE RIGHT TO SECURITY IN THE CRIMINAL LAW*, 217 (2012)).

rights law. The following section will demonstrate that U.S. law enforcement engaged in each aforementioned violation in response to the NODAPL movement at Standing Rock.

IV. The Law Enforcement Response to the NODAPL Protests was Disproportionately Militarized.

To most clearly explicate the extent to which the law enforcement coalition in Standing Rock had militarized in response to peaceful protest, the most problematic elements of the law enforcement strategy will be considered in turn. The disproportionate armaments, counter-insurgency strategy, and the inhumane treatment of detained protestors will each be analyzed in context of the relevant human rights covenants and declarations in order to demonstrate that the law enforcement agencies were utilizing a hostilities paradigm unsuited for civilian policing and were in violation of international human rights law.

A. Disproportionate Armaments

As noted prior, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials states that firearms (defined by the Firearms Protocol as any portable barreled weapon which expels a projectile via explosive action) and ammunition should be prohibited if they cause “unwarranted injury or present[s] an unwarranted risk” and, “In the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary.”¹⁴⁹ The UN Code of Conduct for Law Enforcement Officials makes clear, “Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.”¹⁵⁰ It also bears reminding that even unnecessary use of less-lethal non-firearm weapons like tasers have been the cause for the Human Rights Committee’s citation of U.S. law enforcement. Echoing these principles, the Inter-American Commission on Human Rights also stated that, “The IACHR considers that the public interest does not justify military presence in [I]ndigenous territories to guarantee the feasibility of extraction or development plans and projects that have not been consulted with nor been consented to by [I]ndigenous peoples.”¹⁵¹

In their Request for Precautionary Measures with the Inter-American Commission on Human Rights, the Chairmen of the Standing Rock Sioux Tribe, Cheyenne River Sioux Tribe, and Yankton Sioux Tribe, as well as the Director of the American Indian Law Clinic and the International Program Managing Attorney of Earthjustice, alerted the international community to the conflict between U.S. law enforcement actions and the nation’s agreement to abide by UN standards.¹⁵² According to the request, law enforcement opened fire on civilian protests with

[A]n array of weapons, including concussion grenades, pepper spray, rubber bullets and beanbags, teargas, and chemical sprays. . . long range acoustic devices known to cause hearing loss. . . shot people who were praying, had their backs to the police, were lying on the ground in a protective position, or were trying to protect others. . . The police appeared to target people’s heads. . . [and] continued firing

¹⁴⁹ Basic Principles, *supra* note 126, at ¶ 11(c), 13.

¹⁵⁰ Code of Conduct, *supra* note 121, at art. 3.

¹⁵¹ INTER-AM. COMM’N ON HUM. RTS., INDIGENOUS PEOPLES, AFRO-DESCENDENT COMMUNITIES, AND NATURAL RESOURCES: HUMAN RIGHTS PROTECTION IN THE CONTEXT OF EXTRACTION, EXPLOITATION, AND DEVELOPMENT ACTIVITIES 1, 97(December 31, 2015).

¹⁵² REQUEST FOR PRECAUTIONARY MEASURES, *supra* note 4, at 8.

on protestors they had encircled with barricades and police in riot gear. . . The police sprayed water cannons regularly, for extended periods of time... [and] continued to spray people after ice had formed on them. . . [and fired] the water cannon at a woman who was kneeling and praying about twelve feet from the barricade. . . Medics at the encampment reported treating broken bones, chemical burns to the faces and bodies of protestors, as well as at least one cardiac arrest, and one seizure. There were numerous blunt-force injuries, including a disproportionate number to people's heads. Over one-hundred people were treated for hypothermia after having been indiscriminately sprayed with water [on Backwater Sunday]. At least one woman sustained a severe eye injury when she was hit in the eye with a teargas canister. One man required 17 staples to seal a head-wound from being shot with a rubber bullet at close range. And one young woman suffered serious injuries that may require amputation of her arm when a concussion grenade detonated near her during the confrontation.¹⁵³

Given the lack of armed resistance and the prayerful posture of many water defenders, it is unclear why U.S. law enforcement found it necessary to levy such aggressive measures against the water protectors. The Inter-American Commission on Human Rights issued no precautionary measures.¹⁵⁴ Nonetheless, the use of less-lethal firearms and other munitions when not warranted by proportionate resistance demonstrates a clear violation of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and UN Code of Conduct for Law Enforcement Officials.

B. Counter-Insurgency Strategy and the Hostilities Paradigm

As previously discussed, using a hostilities paradigm that presumes a threat by civilians is not permissible in domestic law enforcement contexts.¹⁵⁵ The use of a paradigm suited for the battlefield instead of civilian policing conveys an exclusionary effect on citizens. It can chill popular dissent and peaceful protest.¹⁵⁶ Yet, rather than presuming that civilians prayerfully protesting were not threats, TigerSwan (whose intelligence briefings were relied upon by U.S. agencies) routinely described water protestors as “terrorists,” referred to direct actions as “attacks,” resistance camps as “battlefields” and “battlespaces.”¹⁵⁷ Internal TigerSwan communications described the movement as “an ideologically driven *insurgency* with a strong religious component” and compared NODAPL water protectors to jihadist fighters.¹⁵⁸ One TigerSwan internal report dated May 4 borrowed language from the U.S. government’s international drone assassination campaign against terrorist targets (“find, fix, finish”) and describes an effort to “find, fix, and eliminate” threats to the pipeline.¹⁵⁹ Even U.S. law enforcement agencies themselves organized through a Department of Homeland Security fusion

¹⁵³ *Id.* at 8-9.

¹⁵⁴ PRECAUTIONARY MEASURES RECORD SEARCH, INTER-AM. COMM’N ON HUM. RTS., <http://www.oas.org/en/iachr/decisions/precautionary.asp?Year=2016&searchText=standing%20rock> (last visited January 31, 2021).

¹⁵⁵ Lieblich & Shinar, *supra* note 8, at 131.

¹⁵⁶ *Id.* at 150.

¹⁵⁷ Brown et al., *supra* note 78.

¹⁵⁸ *Id.* (emphasis added).

¹⁵⁹ *Id.*

center,¹⁶⁰ one of many founded in the wake of 9/11 to support counter-terrorism efforts.¹⁶¹ Rather than approaching civilian policing with a focus on preserving peace through minimal force as required by the law enforcement paradigm, both State actors and the private security agency which provided law enforcement with intelligence reports viewed the civilian water protectors through the lens of the hostilities paradigm, as insurgents or terrorists and not as civilians. In doing so, law enforcement agencies effectively excluded the policed population from the meaningful protections of citizenship that a group of civilian protestors could reasonably expect.

C. Criminalization and Inhumane Treatment of Detained Protestors

As referenced prior, the UN Code of Conduct for Law Enforcement Officials states that law enforcement should not “inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment” nor invoke “exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability, or any other public emergency as justification.”¹⁶² Yet, rather than supporting citizens’ rights to peacefully protest, law enforcement agencies wasted no time arresting pipeline protestors and subjecting detainees to inhumane treatment. After assaulting and clearing water protectors from the Treaty Camp, law enforcement personnel arrested water protectors, placed them in metal cages, wrote inmate numbers on their arms in permanent marker, and stripped them down to one layer of clothing in subfreezing temperatures.¹⁶³ Other inhumane treatment listed in the Chairmen’s Request for Precautionary Measures include strip-searching, hooding, and depriving arrested water protectors of adequate food and water.¹⁶⁴ This treatment does not demonstrate any respect for the dignity of Indigenous persons and their non-Native allies. Instead, it seems eerily reminiscent of a degrading and inhumane fusion between the portable cages used in immigrant detention camps on our southern border and of the tattooing of inmate numbers onto the arms of Holocaust concentration camp detainees. In both U.S. immigrant detention centers and Nazi German concentration camps, the effect of (and perhaps the goal of) such treatment is the clear exclusion of detained populations from participation in the guarantees of the protection of the law. It is difficult to fathom a more “authoritative statement of the law’s lack of authority” than the stripping, hooding, and caging of fellow citizens and the reduction of their identity to a string of numbers written on their arms.¹⁶⁵

V. Righting Wrongs

The disproportionately forceful law enforcement presence at Standing Rock not only caused unnecessary injury, but it also further eroded relationships between Indigenous people, environmentalists, and the federal government. The conduct of law enforcement also set a problematic example for other departments around the nation and the world. The United States occupies a precarious position atop the world stage, and violation of the international human rights standards that our nation has helped implement can only endanger both U.S. diplomatic relations and foreign nations’ incentive to comply with international human rights law.

¹⁶⁰ *Id.*

¹⁶¹ JEFFREY GARDNER, INTELLIGENCE FUSION CENTERS FOR HOMELAND SECURITY 1, 11 (2020).

¹⁶² Code of Conduct, *supra* note 123, at art. 5.

¹⁶³ Brown et al., *supra* note 94.

¹⁶⁴ REQUEST FOR PRECAUTIONARY MEASURES, *supra* note 4, at 8-9.

¹⁶⁵ Lieblich, *supra* note 8, at 151 (2018) (quoting RAMSAY, *supra* note 150, at 217).

Less than four years after NODAPL water protectors were met with excessive force by the law enforcement coalition at Standing Rock, streets across the country filled with Black Lives Matter protestors, right wing counter protestors and anti-maskers, and a familiar black-clad police presence. The tactics and weapons used by law enforcement in the repression of the 2020 Black Lives Matter protests were eerily similar to those used at Standing Rock. For example, Judge Richard Jones of the Western District of Washington in 2020 held the Seattle Police Department and the City of Seattle in contempt of court for violating a restraining order imposed during the protests enjoining them from using “chemical irritants or projectiles of any kind against persons peacefully engaging in protests or demonstrations. . . [including] CS gas (tear gas), OC spray (pepper spray), flash-bang grenades, ‘pepper balls,’ ‘blast balls,’ rubber bullets, and foam-tip projectiles.”¹⁶⁶ According to an analysis by the Armed Conflict Location & Event Data Project, more than 93% of Black Lives Matter protests across the U.S. between May 26 and August 22, 2020 were peaceful, and yet at least 115 protestors were shot in the head, face, and neck with “various projectiles, including bullets and tear gas canisters” from only May 26 to July 27, 2020.¹⁶⁷ This data would indicate that instead of the events at Standing Rock becoming a cautionary tale on how not to police, the tactics and weapons used in the repression of the NODAPL movement were adopted by law enforcement across the country to police the Black Lives Matter movement. The violations visible at Standing Rock have become, or were already, systemic.

The U.S. occupies a position of leadership on the world stage, and when it fails to uphold the human rights law it has assented to, other countries follow suit. Since Standing Rock, other countries have cracked down on BIPOC and environmental movements with great force. In Myanmar, most of the Indigenous Rohingya have fled genocide by domestic law enforcement and military carrying out policing duties.¹⁶⁸ In Brazil, two human-rights organizations have reported President Jair Bolsonaro for incitement to genocide as his government targeted Indigenous environmentalists combatting illegal mining and logging of the Amazon.¹⁶⁹ These are not isolated international incidents, and the U.S. has little moral standing to combat militarized repression of BIPOC peoples globally when it is happening domestically as well.

Future law enforcement actions could avoid violating international human rights law by strictly observing the norms and conventions it imposes. Rather than wearing body armor, riding in armored vehicles, and carrying assault rifles and grenade launchers into community peacekeeping, law enforcement would best serve their communities by policing in civilian uniforms without the exclusionary capacity of a visibly militant force. Rather than utilizing potentially deadly less-lethal weaponry like rubber-coated steel bullets, chemical gas, and concussion grenades when not under imminent threat, peace officers seeking to live up to the law enforcement paradigm they are bound by should limit force to the minimum degree possible. Rather than arresting demonstrators en masse, stripping them to their underlayers, writing inmate numbers on their arms, and leaving them in cages, all persons should be extended the guarantees of humane treatment that are an imperative of our domestic and international systems of justice.

¹⁶⁶ Black Lives Matter Seattle-King Cty. v. City of Seattle, Seattle Police Dep't, 466 F. Supp. 3d 1206 (W.D. Wash. 2020).

¹⁶⁷ US CRISIS MONITOR RELEASES FULL DATA FOR SUMMER 2020, ACLED (Aug. 31, 2020), <https://acleddata.com/2020/08/31/us-crisis-monitor-releases-full-data-for-summer-2020/>.

¹⁶⁸ Hum. RTS. WATCH, ROHINGYA, <https://www.hrw.org/tag/rohingya> (last visited Feb. 19, 2021).

¹⁶⁹ Renato Antunes do Santos, *Bolsonaro's hostility has driven Brazil's Indigenous peoples to the brink*, NATURE (Aug. 19 2020), <https://www.nature.com/articles/d41586-020-02431-0>.

VI. Conclusion

The international human rights law enforcement paradigm requires State agents to limit force used in policing to absolute necessity. Even then, force should be limited such that it is the minimum necessary in proportion to the threat. Indeed, even by being perceived as equipped for military-style combat, police forces risk creating a friend/enemy distinction whereby the policed community is excluded from the political collective. The U.S. law enforcement use of disproportionate arms and armaments, the deprivation of civilian detainees' rights, and the use of a hostilities paradigm that fueled those actions at Standing Rock likely constituted violations of the declarations and covenants which underlie international human rights law. Despite the likely violations, the Dakota Access pipeline continues to carry nearly five percent of the oil produced every day in the U.S. through unceded Indigenous land, constituting harm to both Indigenous peoples and U.S. moral authority.

The violations of international human rights law which likely occurred at Standing Rock should be instructive of the risks law enforcement takes in allying with extractive interests against environmental and Indigenous protestors. These same violations should provide an instructive example of how not to police civilian populations with disproportionate arms and tactics in violation of international human rights law. If the U.S. seeks to maintain its position as a leader in the international community, officials will do best to heed the words of the late President John F. Kennedy, an ally of Indigenous peoples who declared "the rights of every man are diminished when the rights of one man are threatened."¹⁷⁰

¹⁷⁰ JFK Library, *John F. Kennedy's 1963 Televised Address to the Nation on Civil Rights*, YOUTUBE (June 5, 2020), [https://www.youtube.com/watch?v=58O2De-iPOk](https://www.youtube.com/watch?v=58O2De-iPOk;).; Chris T. Stearns, J.F.K. Was a Mighty Warrior for Indian Country (Nov. 22, 2013) (J.F.K. called for an end to tribal termination, a restoration of treaty observance, and a fostering of tribal self-determination), <https://hobbsstrauss.com/jfk-was-a-mighty-warrior-for-indian-country/>.