



# POLICY BRIEF

 **ANTIQUITIES  
COALITION**

How can cultural heritage threatened by globalization and environmental destruction be protected? Looking to the crimes against humanity of deportation or forcible transfer as a potential legal remedy.

By Haydee Dijkstal

March 2022 | No. 10

# ABOUT THE AUTHOR



Haydee Dijkstal is a UK Barrister at 33 Bedford Row Chamber in London practicing international criminal law and international human rights law. She is also a US attorney with over a decade of experience in international law.

Haydee's practice in the area of international criminal law has included cases before the International Criminal Court, International Tribunal for the Former Yugoslavia, and the Special Court for Sierra Leone, and has involved the representation of victims, governments and accuseds. Haydee is currently acting as counsel for a group of Afghan victims participating before the ICC.

Her previous ICC instructions include: co-counsel for victims of the Gaza Freedom Flotilla, and for the Gov of the Comoros, in the first Article 53(3) judicial review proceedings; Defence team for former Libyan spy chief, Abdullah Al-Senussi; legal team for the Gov of Kenya for its admissibility challenge; co-counsel instructed to submit an amicus curiae brief in the Palestine Situation (on the scope of the court's territorial jurisdiction); and co-counsel instructed to submit an amicus brief in the Ntaganda case (on the scope of 'attack' for war crimes against cultural property). She has been instructed as counsel for a number of Art 15 Submissions to the Office of the Prosecutor.

Before other tribunals, she was on defence team for Charles Taylor at the SCSL, and the defence team for Milan Lukic at the ICTY for review proceedings. Haydee's practice in the area of international human rights law includes cases before the European Court of Human Rights, African Commission and Court on Human and Peoples' Rights, and UN bodies such as the Working Group on Arbitrary Detention, the Committee against Torture, the Committee on Enforced Disappearances and before UN Special Rapporteurs.

Haydee publishes on the intersection between protection of cultural heritage under international law, and international criminal and international human rights law.

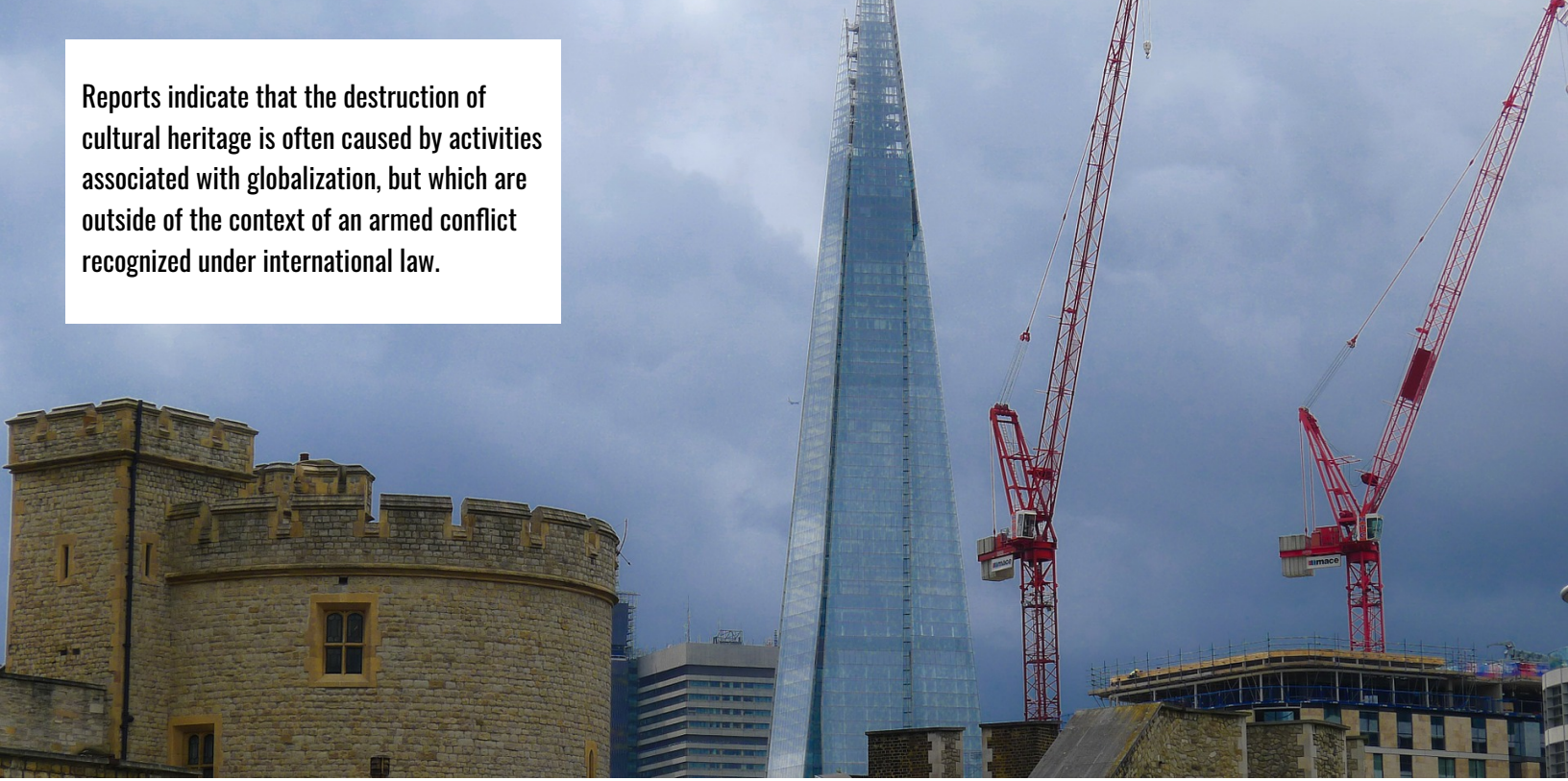
# ABOUT THE THINK TANK

The Antiquities Coalition unites a diverse group of experts in the global fight against cultural racketeering: the illicit trade in art and antiquities. This plunder for profit funds crime, armed conflict, and violent extremist organizations around the world—erasing our past and threatening our future. Through innovative and practical solutions, we tackle this challenge head on, empowering communities and countries in crisis.

In 2016, as part of this mission, we launched the Antiquities Coalition Think Tank, joining forces with international experts, including leaders in the fields of preservation, business, law, security, and technology. Together, we are bringing high-quality and results-oriented research to the world's decision makers, especially those in the government and private sectors. Our goal is to strengthen policymakers' understanding of the challenges facing our shared heritage and more importantly, help them develop better solutions to protect it. However, the views expressed in these policy briefs are the author's own, and do not necessarily reflect those of the Antiquities Coalition.

We invite you to learn more at [thinktank.theantiquitiescoalition.org](http://thinktank.theantiquitiescoalition.org).

Reports indicate that the destruction of cultural heritage is often caused by activities associated with globalization, but which are outside of the context of an armed conflict recognized under international law.



## I. Executive Summary

These proceedings have emphasized the international importance of protecting cultural heritage, not just as acts against important objects and buildings, but as crimes against groups of victims, and even humankind.

1. With the first prosecutions of the war crime of destruction of cultural heritage before the International Criminal Court in the cases against Ahmad Al Faqi Al Mahdi and Ag Abdoul Aziz Al Hassan, it has been demonstrated that acts which destroy cultural heritage are amongst the crimes grave enough to be addressed by the Court as judicable crimes within its jurisdiction. These proceedings have emphasized the international importance of protecting cultural heritage, not just as acts against important objects and buildings, but as crimes against groups of victims, and even humankind. Reports indicate that the destruction of cultural heritage is often caused by activities associated with globalization, but which are outside of the context of an armed conflict recognized under international law. This dynamic makes it clear that the war crime of attacks against cultural heritage under Article 8(2)(b)(ix) and 8(2)(e)(iv) of the Rome Statute, which requires that the crime is committed during an armed conflict, is inapplicable to situations where cultural heritage is destroyed by way of activities such as large-scale development projects and exploitation of natural resources, leading to environmental damage and abusive land acquisitions.

2. This paper addresses the fact that the crimes within the ICC's jurisdiction only provide a remedy for actions against cultural heritage perpetrated during conflict or war. As this reality leaves a gap in recourse for victims harmed outside a recognized armed conflict, this paper raises the possible applicability of other crimes within the Rome Statute which might provide victims an alternative avenue of seeking accountability.

3. Activities of globalization directly affect the rights of communities – and disproportionately indigenous peoples – to practice their culture and interact with their heritage on the affected land, which is often integrally tied to a group's culture. Therefore, this paper explores the link between environmental crimes, the destruction of cultural heritage, and the crimes against humanity of deportation and forcible transfer before the ICC.



Through this link, this paper recommends that the crime against humanity of deportation and forcible transfer be explored and utilized, both by the Office of the Prosecutor and by victims who can raise their harm before the Court, to protect cultural heritage by prosecuting instances where activities associated with globalization occurring outside an identified armed conflict, as defined under international law, force people from their lands and destroy the land and environment, which are integral to their cultural heritage.

## II. Introduction

The destruction of cultural heritage is often associated with war and armed conflict, but it is becoming increasingly clear that a major threat to culture and cultural heritage come from the activities of humans and their consequences, occurring outside an armed conflict.

4. The destruction of cultural heritage is often associated with war and armed conflict, but it is becoming increasingly clear that a major threat to culture and cultural heritage come from the activities of humans and their consequences, occurring outside an armed conflict. This is particularly true for the destruction and loss of cultural heritage caused by commercial and industrial development projects and the extraction of natural resources.<sup>[1]</sup> As a result of these activities associated with globalization, experts have warned that environmental destruction and climate change have become major threats to the sustainability of many communities' cultures.<sup>[2]</sup>

5. Particularly troubling is the extent to which environmental destruction and land-grabs, stemming from the development and exploitation of the land, directly affect the rights of these communities to live and practice their cultural heritage on the affected land when local populations, and disproportionately indigenous peoples, are displaced from their ancestral territories.

6. The first prosecutions of the war crime of destruction of cultural heritage before the International Criminal Court (ICC) raised the question of whether the Court could provide a legal remedy and achieve accountability for acts of cultural heritage destruction. With the cases against Ahmad Al Faqi Al Mahdi and Ag Abdoul Aziz Al Hassan, the Court has confirmed that acts which destroy cultural heritage are amongst the crimes grave enough to be admissible to the Court's jurisdiction. Its decisions have emphasized the international importance of protecting cultural heritage to preserve the history and significance associated with objects and buildings, but also to ensure the ability of all people to practice and participate in the culture and pass it to future generations. It would, therefore, seem that the application of international criminal law before the ICC, and the crime of destruction of cultural heritage, specifically, might provide a clear legal remedy for holding those most responsible to account for their activities, which extinguish entire communities' access to their cultural heritage.

7. However, given that the Rome Statute only enumerates the crime of destruction of cultural heritage as a war crime, under Article 8(2)(b)(ix) and 8(2)(e)(iv), these provisions fail to sufficiently address the fact that cultural heritage is often destroyed through commercial development ventures or government actions committed outside of a recognized armed conflict. Indeed, the severe effects of damage to the environment – which this paper submits can, consequently, have a detrimental impact on the cultural heritage of groups and communities – led an independent expert panel in June 2021 to address the Rome Statute's failure to provide a crime for



addressing such actions by proposing a definition for the crime of ‘ecocide,’ which the panel suggested should be added to the Statute by amendment.<sup>[3]</sup>

8. With no crime currently enumerated within the Rome Statute which covers the destruction of cultural heritage caused by actions impacting the environment outside the context of an armed conflict, it is recommended that the link between cultural heritage and land be recognized as providing a potential opportunity for an alternative remedy through the crime against humanity of deportation and forcible transfer. Given this integral link, the crime of deportation and forcible transfer could be used to address loss of cultural heritage by prosecuting instances of environmental damage or land acquisition, caused by industrial projects and natural resource extraction, which destroys the land and resources that are integral to a group’s cultural heritage and thus forces them from their lands and.

### III. Destruction in the Absence of an Armed Conflict: Cultural Heritage and Ancestral Land Loss from Development Projects and Environmental Damage

Notable to cases of environmental crimes harming various aspects of a group’s cultural heritage is the further expansion of international protections from physical properties, which speak to the heritage of the cultural property, to broader protections over the “practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artefacts and cultural spaces” that constitute intangible cultural heritage.

9. In the context of war or armed conflict, an examination of the development of measures to ensure the protection of cultural heritage began with a focus on acts against property, and destruction or damage occurring. Instances often cited include the destruction of the Buddhas of Bamyán in Afghanistan by the Taliban or the shelling of Stari Most in Mostar during the Bosnian War.<sup>[4]</sup> Much of this focus can be attributed to the historical development of legal protections for cultural property, which appeared as a response to major armed conflicts in the 19<sup>th</sup> and 20<sup>th</sup> centuries<sup>[5]</sup> and only progressively developed over time from its initial “protection[s] of state sovereignty over the property that was at stake”<sup>[6]</sup> towards wider protections, whereby the object of protection explicitly covers and considers the heritage of the protected cultural property.<sup>[7]</sup> Notable to cases of environmental crimes harming various aspects of a group’s cultural heritage is the further expansion of international protections from physical properties, which speak to the heritage of the cultural property, to broader protections over the “practices, representations, expressions, knowledge, skills—as well as the instruments, objects, artefacts and cultural spaces” that constitute intangible cultural heritage.<sup>[8]</sup>

10. However, development of these legal protections has progressively responded to reports which highlight that cultural heritage is not only vulnerable during times of war, but equally at risk at times when an armed conflict, as defined under international law, is not present. For example, the World Heritage Convention in 1972 was motivated by the risk associated with the construction of the Aswan High Dam on the Nile to the “ancient Nubian monuments in the rock temples of Abu Simbel in Egypt”,<sup>[9]</sup> and the 1968 UNESCO Recommendation Concerning the Preservation



of Cultural Property Endangered by Public or Private Works specifically regulated activities outside an armed conflict that would affect culture, such as construction for pipelines and electricity lines.<sup>[10]</sup> UNESCO has recognized that “[c]limate change is today amongst the greatest threats to culture and cultural heritage, both tangible and intangible.”<sup>[11]</sup>

11. Importantly, these activities display a common thread, in regards to the individuals and communities who call the affected land home and to whom the land is inseparable from their history and culture. In many cases, development projects, natural resource extraction and environmental damage forces indigenous communities from the land on which their cultural heritage is significant. Their loss can become two-fold, whereby the culture tied to the land is destroyed by the industrial activity or environmental consequence, and their eviction from ancestral lands deprives these communities of not only tangible cultural heritage, such as religious or cultural buildings or sites, but also of their intangible heritage, such as religious rituals or cultural traditions, which is inseparable from the land, and impossible to practice and pass-on, absent the property that gives their culture meaning.

12. A wide scope of reported incidents demonstrates how development projects and exaction of natural resources come hand-in-hand with land acquisition and environmental damage; both which displace the local, and most often indigenous, population and jeopardize their relationship with their cultural heritage.

13. For industrial and commercial development projects, this is demonstrated in Nepal, where a project to expand roads on the ancestral lands of the Newa people led to governmental eviction from ancestral lands and subsequent destruction of cultural and religious sites on these lands.<sup>[12]</sup> Similarly, in the Maldives, it is estimated that 80% of “historical and archaeological sites have already been destroyed for the construction of resorts and development projects.”<sup>[13]</sup>

[1]In the Maldives, it is estimated that 80% of “historical and archaeological sites have already been destroyed for the construction of resorts and development projects.”

14. The construction of the Three Gorges Dam in the southwestern province of Sichuan, China is a clear illustration of a large-scale development project that not only displaced the local population but also caused the loss of both tangible and intangible cultural heritage. Its construction is reported to have resulted in a staggering number of displaced people— a number exceeding 1 million people—in what has been called “the largest peacetime evacuation in history, amounting to the greatest displacement challenge ever caused by a development project,” due to flooding of thousands of cities and villages.<sup>[14]</sup> Importantly, the project impacted significant cultural heritage of the local population, including “the loss of many archaeological and cultural sites” of historical significance, such as “ancient buildings, stone sculptures, bridges, and cliff paths” and “habitation settlements and historical cemetery complexes.”<sup>[15]</sup> The Ilisu dam on the Tigris river in South-East Turkey caused similar harm. The displacement of Kurdish communities from villages which were flooded by the dam’s construction affected cultural sites, including the historical bazaar in Hasankeyf, which is noted as meeting 9 of the 10 criteria necessary to be listed as a UNESCO World Heritage site.<sup>[16]</sup>



Iron ore company Rio Tinto destroyed two ancient and sacred Aboriginal caves at Juukan Gorge in Western Australia, which were of cultural importance to the Puutu Kunti Kurrama and Pinikura people. The caves, which were also recognized as containing evidence of human habitation 46,000 years ago, were destroyed to expand the company's mine in the area.

15. The extraction of natural resources has been shown to similarly displace indigenous communities and lead to the destruction or inaccessibility of their heritage. For example, mining and industrial construction in the Jharkhand province of India resulted in acquisition from the Santhal Adivasi people of land that is critical to practicing their egalitarian culture.<sup>[17]</sup> In Kenya, the combination of deforestation and land allocation policies has threatened the cultural heritage of the Kikuyu people around Mount Kenya, which has cultural symbolism and religious significance, and is home to lakes and trees considered sacred.<sup>[18]</sup> Most recently, iron ore company Rio Tinto destroyed two ancient and sacred Aboriginal caves at Juukan Gorge in Western Australia, which were of cultural importance to the Puutu Kunti Kurrama and Pinikura people.<sup>[19]</sup> The caves, which were also recognized as containing evidence of human habitation 46,000 years ago, were destroyed to expand the company's mine in the area.<sup>[20]</sup> The mining blasts led to condemnation from Corporate Human Rights Benchmark and the World Benchmarking Alliance for the “destruction of invaluable cultural heritage at Juukan Gorge” causing “severe adverse impact on cultural rights.”<sup>[21]</sup>

16. Importantly, these activities result in environmental and climate consequences, which similarly affect indigenous communities and, ultimately, their cultural heritage. A clear example comes from Brazil, where the situation of a number of indigenous groups, including the Tenetehara, the Pyhcop Catiji, the Ka'apor people of Maranhão, and the Mura Tribe highlights how commercial activities, such as deforestation, can lead to environmental damage, which together causes the displacement in the Maldives, it is estimated that 80% of “historical and archaeological sites have already been destroyed for the construction of resorts and development projects.” of local communities and destruction of their cultural heritage.<sup>[22]</sup> Reports set out how deforestation of the rainforest in the Amazon has led to severe drought, which bring fires during the dry season.<sup>[23]</sup> [HD7] For these groups, displacement from their lands, which are of cultural significance, not only results in the loss of their ancestral territory but also in their inability to interact with their culture, where “songs, dances, and ceremonies are about nature and their place in it, now and in the afterlife.”<sup>[24]</sup> An individual from the Iracadju Ka'apor community emphasized the importance of the forest on these lands to their cultural heritage and identity stating that “The forest is our home; it heals our soul. Without it, we are nothing.”<sup>[25]</sup>

## IV. The inapplicability of the Rome Statute's crimes of destruction of cultural heritage

17. When seeking a remedy under international law for the harm caused and deprivation of rights, the International Criminal Court comes to mind, due to recent actions by the ICC Prosecution signaling an increased commitment to addressing the crime of destruction or damage to cultural heritage. It raises the question of whether instances of destruction due to development projects, natural resource extraction or environmental damage could be addressed by the Court.



This paper recommends that the crime against humanity of deportation and forcible transfer is utilized in instances where groups and communities are forced from their lands as a result of coercive acts and activities against the land and resources integral to their cultural heritage.

18. The cases against two Malian individuals, Ahmad Al Faqi Al Mahdi and Ag Abdoul Aziz Al Hassan,<sup>[26]</sup> signified the Prosecutor’s willingness to pursue individuals most responsible for “intentionally directing attacks against” cultural heritage, particularly “historical monuments” and “buildings dedicated to religion, education, art, science or charitable purpose.”<sup>[27]</sup> As the court permanently established to ensure that the “most serious crimes of concern to the international community as a whole [do] not go unpunished,”<sup>[28]</sup> the prosecutions of Al Mahdi and Al Hassan sent a message on the importance of accountability for the destruction of culture, not just as acts against important objects, buildings or land, but as crimes affecting the rights of victims and humankind, as a whole.<sup>[29]</sup>

19. In addition, the fact that Al Mahdi was charged solely with the war crime of destruction of cultural heritage for his responsibility in the destruction of mausoleums and a mosque in Mali as an alleged member of the militant group Ansar Eddine, demonstrates that acts which damage or destroy cultural heritage are amongst the crimes sufficiently grave to be found admissible to the Court’s jurisdiction, and are serious enough to stand alone on an indictment.<sup>[30]</sup>

20. However, it must be recognized that the Court has limitations over its ability to prosecute instances of destruction of cultural heritage not occurring during an armed conflict, as was the case for the culture in issue in the Al Mahdi and Al Hassan cases. As the crimes enumerated within the Rome Statute pertaining to the destruction of cultural heritage under Articles 8(2)(b)(ix) and 8(2)(e)(iv) are war crimes, which must be committed within the context of an armed conflict, there is no specific crime within the jurisdiction of the Court addressing attacks against cultural heritage committed in the absence of an armed conflict, as defined under international law. Although instances of destruction caused outside an armed conflict by globalization activities and the resulting effects of environmental change might result in similar harm to the groups and communities affected, these acts cannot be equally prosecuted at the Court, due to the unavailability of a specific crime applicable to cultural heritage destruction outside of an armed conflict.

21. In the face of this reality, the question remains as to whether international criminal law, particularly before the International Criminal Court, provides any remedy for achieving justice and accountability for the loss of culture and cultural heritage caused by human activities outside an armed conflict. For this reason, this paper recommends that the crime against humanity of deportation and forcible transfer is utilized in instances where groups and communities are forced from their lands as a result of coercive acts and activities against the land and resources integral to their cultural heritage.

## V. Linking culture and the land

22. In response to this shortcoming within the Rome Statute, it is suggested above that other crimes could be pursued, which might not directly relate to individual criminal responsibility for the destruction of cultural heritage, but which are similarly linked to the situations of destruction and loss set out above. In particular, the fundamental link between the cultural heritage





lost and the land affected provides a means for pursuing the crime against humanity of deportation or forcible transfer of a population in accordance with Article 7(1)(d) of the Rome Statute.

23. The interconnectivity between culture, the environment, and land is recognized in international law. International instruments which set out the right “to take part in cultural life”, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>[31]</sup> also mandate that States take steps “to achieve the full realization of this right,” including measures for conservation efforts to preserve culture.<sup>[32]</sup> Addressing this link in the reverse, the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment defines the ‘environment’ as including “property which forms part of the cultural heritage.”<sup>[33]</sup>

24. Importantly, commentary from the Committee on Economic, Social and Cultural Rights squarely acknowledges the link between culture and ancestral land and the risk that globalization possesses to the effective and genuine realization of this right. The Committee emphasized that, in order to protect cultural heritage, States must pay “[p]articular attention ... to the adverse consequences of globalization, undue privatization of goods and services, and deregulation on the right to participate in cultural life,” as well as “illegal or unjust exploitation of their lands, territories and resources by State entities or private or transnational enterprises and corporations.”<sup>[34]</sup>

25. The Inter-American human rights system has acknowledged this interplay in interpreting the rights set out under the American Convention on Human Rights such that the right to property is recognized as ‘singularly important’ as a “fundamental basis for the development of indigenous communities’ culture, spiritual life, integrity and economic survival.”<sup>[35]</sup> In practice, the Inter-American Court has equally recognized this connection; finding that indigenous peoples’ rights to territorial land encompasses “the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture” and “[p]roperty of the land ensures that the members of the indigenous communities preserve their cultural heritage.”<sup>[36]</sup>

26. This link allows for recognition that the harm suffered by victims whose culture or cultural heritage has been lost equally relates to the ancestral land taken, and allows for the focus of criminal proceedings to be on the forcible movement of people away from the land on which their culture was based. Importantly, in 2015 the Prosecution stated that it “will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, *inter alia*, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.”<sup>[37]</sup>—This announcement not only affirms the Prosecution’s commitment to pursue cases against the very criminal activity which has resulted in the destruction of the local population’s culture, but indicates that the Prosecution is willing to proceed with charging crimes for acts which facilitated the harm done.

Importantly, in 2015 the Prosecution stated that it “will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, *inter alia*, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land.”



## VI. Applying the crime against humanity of deportation and forcible transfer

27. When exploring the applicability of the crime against humanity of deportation and forcible transfer to cases whereby communities are forced from the land due to globalization activities which damage and destroy the land and resources integral to their culture, it must be decided whether the elements of the crimes can be made out. The below sets out the elements of the crime required and relevant case law to consider when it is asserted that the environmental impact of industrial and commercial activities are the root of the crime.

28. To start, as a crime against humanity within the Rome Statute,<sup>[38]</sup> ‘deportation or forcible transfer of population’ is committed when there is “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.”<sup>[39]</sup>

29. The Court’s jurisprudence has clarified that deportation and forcible transfer are separate crimes, whereby “the displacement of persons lawfully residing in an area to another State amounts to deportation, whereas such displacement to a location within the borders of a State must be characterised as forcible transfer.”<sup>[40]</sup>

30. For many instances of displacement due to acts such as industrial and commercial development and land acquisition, the displacement of local populations is within the borders of a single State, making the crime against humanity of forcible transfer most suitable. However, the crime against humanity of deportation may become relevant in such instances as the deforestation and resulting fires in the Amazon, which are reported to affect indigenous communities in the rainforest territories of South America. This includes not only Brazil but also Colombia, Peru, Bolivia, Ecuador, Venezuela and Paraguay, where fires have presented the risk of pushing these groups across borders and “compelling them to seek refuge in regions that do not correspond to their traditional territories.”<sup>[41]</sup>

31. The traditional and ancestral nature of the land of indigenous groups further speaks to the elemental requirement within the crimes against humanity of deportation and forcible transfer for displaced persons to have been ‘lawfully present’ in the area from which they were displaced. The finding that this element of the crime “should not be equated with the requirement of lawful residence”,<sup>[42]</sup> along with international instruments which support the principle of ‘free, prior and informed consent’ and the right to self-determination,<sup>[43]</sup> could potentially assist in instances where contemporaneous tenancy and ownership of the land are at issue.

32. ICC case law indicates that instances of displacement caused by acts relating to industrial development, natural resource extraction, land-grabs or environmental damage fall squarely within the element of the crime requiring that those deported or forcibly transferred were done so “by expulsion or other coercive acts.”<sup>[44]</sup> In the Kenya Situation, it was determined that both deportation and forcible transfer are “open conduct

For many instances of displacement due to acts such as industrial and commercial development and land acquisition, the displacement of local populations is within the borders of a single State, making the crime against humanity of forcible transfer most suitable.



The act of “destruction of property” was recognized, among other coercive acts, in the Kenya Situation as “result[ing] in coercing” a local community’s displacement.

For many instances where indigenous and local populations are forced from their ancestral lands, and away from their cultural heritage and the ability to practice their culture, the industrial or commercial activity which causes the group’s displacement does not represent a single incident but successive coercive acts, which compel the local population’s movement.

crime[s]” whereby “the perpetrator may commit several different conducts which can amount to ‘expulsion or other coercive acts’ so as to force the victim to leave the area where he or she is lawfully present.”<sup>[45]</sup> The act of “destruction of property” was recognized, among other coercive acts, in the Kenya Situation as “result[ing] in coercing” a local community’s displacement.<sup>[46]</sup> Further jurisprudence from proceedings regarding the Court’s jurisdiction over alleged crimes in Myanmar and Bangladesh, addressed the “different conducts” which constitute coercive acts as including “deprivation of fundamental rights, killing, sexual violence, torture, enforced disappearance, destruction and looting.”<sup>[47]</sup> The fact that coercive acts can not only be identified as the destruction of property, but also the deprivation of fundamental rights, demonstrates the applicability of situations where a group is deprived of their rights of access and ownership over property and the ability to practice their culture by successive acts of illegal acquisition, destruction of cultural property or environmental damage of the land.

33. These coercive acts must be “without grounds permitted under international law.”<sup>[48]</sup> In this regard, the lawfulness of the activity has been found to be informative.<sup>[49]</sup> This highlights that cases where the local population is displaced and deprived of their cultural heritage must involve illegal activity such as the illegal acquisition of land, the development of land which violates law and regulations on the consent of the local population, environmental impact which violates environmental regulations, or where the human rights of the local population are violated.

34. Likewise, the contextual elements of a crime against humanity under Article 7 of the Rome Statute must be present, such that the crimes against humanity of deportation or forcible transfer were “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>[50]</sup> For many instances where indigenous and local populations are forced from their ancestral lands, and away from their cultural heritage and the ability to practice their culture, the industrial or commercial activity which causes the group’s displacement does not represent a single incident but successive coercive acts, which compel the local population’s movement. For example, illegal deforestation in South America is so widespread that it has affected around 350 indigenous communities across seven States in the region,<sup>[51]</sup> and the Three Gorges Dam in China displaced over a million people from cities and villages.<sup>[52]</sup>

35. Last, knowledge of the attack on the civilian population is demonstrated by the awareness of commercial and industrial actors, and government authorities, of the harm caused to the local community by these activities. Here, the international standards of ‘free, prior and informed consent’ (FPIC), which require that groups and communities affected by industrial and commercial projects must be consulted and included in the decision-making process to ensure that their rights to the land and to self-determination are protected, are again key.<sup>[53]</sup> The process of FPIC raises the likelihood that organizations and companies leading developmental project are aware of any objections from local communities and would, therefore, be moving forward with knowledge of the harm their actions may cause.

36. For example, reports indicate that mining company, Rio Tinto, was



aware of the Puutu Kunti Kurrama and Pinikura peoples' objection to plans for destroying the Juukan Gorge caves in Western Australia and knew the cultural significance of the caves to these groups before the company proceeded with their destruction.<sup>[54]</sup> Similarly, reports indicate that the ancestral lands of the indigenous Adivasi communities of Jharkhand province in India were acquired for mining activities and the construction of a power plant, despite pleas to the mining company and government authorities for meaningful consultations and legal challenges raising opposition.<sup>[55]</sup>

37. Based on the applicability of each of the elements of the crimes against humanity of deportation and forcible transfer, it is suggested that the crime could be applied in many instances where the cultural heritage of indigenous and local populations is destroyed, or access to culture is denied, by activities associated with globalization, such as large-scale development projects, natural resource extraction, and environmental damage which force these communities from their ancestral lands.

## VII. Conclusion

Recent steps before the International Criminal Court to prioritize cases of destruction of cultural heritage, including the Prosecutor's expressed commitment for considering crimes committed "by means of, or that result in, ... the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land," emphasizes the possibility of seeking accountability before the ICC against those most responsible for depriving groups of the culture and land from which their identity derives.

38. Recent steps before the International Criminal Court to prioritize cases of destruction of cultural heritage, including the Prosecutor's expressed commitment for considering crimes committed "by means of, or that result in, ... the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land,"<sup>[56]</sup> emphasizes the possibility of seeking accountability before the ICC against those most responsible for depriving groups of the culture and land from which their identity derives. With the absence of a specific crime within the Rome Statute to address the destruction of cultural heritage occurring outside a recognized armed conflict, using the crime against humanity of deportation or forcible transfer, provides an opportunity to seek justice for the loss of cultural heritage by prosecuting the forcible displacement of communities from the land associated with their culture through coercive acts associated with globalization projects and environmental damage. The applicability of the crime against humanity of deportation or forcible transfer evidences the important link between cultural heritage and the land from which that culture derives its significance and demonstrates how rights to property are inseparable from the right to culture and self-determination.

## VIII. Recommendation

In confronting the fact that the Rome Statute does not enumerate a crime against the destruction or damage of cultural heritage when committed outside an armed conflict, as identified under international law, including as a result of activities of globalization, which harm the environment, this paper aims to propose and recommend an alternative remedy for victims or victims' advocates to seek justice before the Court. This paper recommends that, in cases where industrial projects or natural resource extraction causes harm or destruction to land integral to the culture of those living on it and, in turn, forces these communities from the land, the crime against humanity of deportation or forcible transfer could be explored as a potential avenue

for accountability.

## Endnotes

- [1] See, for example, “Individual Report on the International Covenant on Economic, Social and Cultural Rights,” *Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, Report No. 1, December 2013, paras. 13, 1 (<https://www.ohchr.org/en/issues/environment/srenvironment/pages/mappingreport.aspx>).
- [2] See, for example, the findings and observations of the Special Rapporteur in the field of cultural rights in regards impact on the Maldives and more widely around the world, “Preliminary findings and observations, UN Special Rapporteur in the field of cultural rights Karima Bennouna, Male, June 18, 2019” (<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24703&LangID=E>).
- [3] “Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text,” *Stop Ecocide Foundation*, June 2021 (<https://static1.squarespace.com/static/5ca2608ab914493c64ef1f6d/t/60d1e6e604fae2201d03407f/1624368879048/SE+Foundation+Commentary+and+core+text+rev+6.pdf>).
- [4] *Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles* - Article 27: Right to Cultural, Artistic and Scientific Life (<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23981&LangID=E>).
- [5] The 1874 Brussels Declaration, is attributed to the destruction of the cathedral and library in Strasbourg during the Franco-Prussian War, the Preliminary Peace Conference of Paris in 1919 is said to be a reaction to the destruction of churches and libraries during World War I, and the Charter of the Nuremberg Tribunal and trials before its Tribunal responded, in part, to the plunder of museums and libraries of art treasures and collections during World War II. These documents, along with others including the Additional Protocols of the 1949 Geneva Conventions, developed the prohibition on destroying cultural property during times of war, and eventually the recognition of individual criminal responsibility for the war crime of destroying cultural property. See, Ana Filipa Vrdoljak, *The Criminalisation of the International Destruction of Cultural Heritage, in Forging a Socio-Legal Approach to Environmental Harm: Global Perspectives*, p. 2 (2016); M. Adatci, *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, 14 AM. J. INT’L L. 95 (1920) “Two Hundred and Eighteenth Day: Tuesday, 1 October 1946,” *Proceedings 27 August 1946 – 1 October 1946*, 22 Trial of the Major War Criminals before the International Military Tribunal: Nuremberg, 14 November 1945–1 October 1946, At 540 (1948); *Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts* art. 16, June 8, 1977, 1125 U.N.T.S. 609; *Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts* art. 53(a), June 8, 1977, 1125 U.N.T.S. 3.
- [6] British Inst. Of Int’l and Comparative Law, *The Protection of Cultural Heritage in Conflict*, Seminar Report, p. 5 (2013) ([https://www.bicil.org/files/6429\\_cultural\\_heritage\\_in\\_conflict\\_-\\_bicil\\_seminar\\_report\\_-\\_24\\_april\\_2013.pdf](https://www.bicil.org/files/6429_cultural_heritage_in_conflict_-_bicil_seminar_report_-_24_april_2013.pdf)).
- [7] See, for example, *Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts* art. 16, June 8, 1977, 1125 U.N.T.S. 609; and *Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts* art. 53(a), June 8, 1977, 1125 U.N.T.S. 3, which both prohibit “acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.” See also, *1954 Hague Convention for the Protection of Cultural Property in the Event of an Armed Conflict* and its *First Protocol of 1954* and *Second Protocol of 1999*.
- [8] *Convention for the Safeguarding of the Intangible Cultural Heritage*, Oct. 17, 2003, 2368 U.N.T.S. 35, art. 2(1).
- [9] ICC, *Prosecutor v. Al-Mahdi*, ICC-01/12-01/15-214-AnxII-Red2, Expert Report—Reparations Phase, para. 33 (Aug. 11, 2017).
- [10] UNESCO, 15 C/Res., *Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works*, para. 8(f) (Nov. 19, 1968).
- [11] Preliminary findings and observations, UN Special Rapporteur in the field of cultural rights Karima Bennouna, Male (June 18, 2019).
- [12] *The Indigenous World 2019*, The International Work Group for Indigenous Affairs, p. 17 (April 2019).
- [13] Preliminary findings and observations, UN Special Rapporteur in the field of cultural rights Karima Bennouna, Male (June, 18 2019).
- [14] Gleick, Peter H., “Three Gorges Dam Project, Yangtze River, China,” *The World’s Water 2008-2009: The Biennial Report on Freshwater Resources*, Island Press, 139, 145 (Mar 5, 2013); Heming, Li et al., “Reservoir Resettlement in China: Past Experience and the Three Gorges Dam”, *The Geographical Journal*, Vol. 167, No. 3, 201, 204-208 (Sep. 2001); Ponseti, Marta, and López-Pujol, Jordi, “The Three Gorges Dam Project in China: history and consequences”, *Revista d’Història Moderna i Contemporània*, 151, 174-177 (2006); and “Chinese Dam Projects Criticized for Their Human Costs,” *The New York Times*, Nov. 19, 2007.

- [15] Ponseti, Marta, and López-Pujol, Jordi, “The Three Gorges Dam Project in China: history and consequences”, *Revista d'Història Moderna i Contemporània*, 151, 174-177 (2006). See also, Gleick, Peter H., “Three Gorges Dam Project, Yangtze River, China,” *The World's Water 2008-2009: The Biennial Report on Freshwater Resources*, Island Press, 145 (Mar 5, 2013).
- [16] “Destruction of Cultural Heritage, Displacement of Kurds in Turkey,” *Observatoire de la Turquie Contemporaine* (March 1, 2019).
- [17] *State of the World's Indigenous Peoples*, Vol. 1, UN Department of Economic and Social Affairs, ST/ESA/328, 2009, p. 89; Report: *The Adivasis of India*, Minority Rights Group International, 98/1, p. 19.
- [18] Joseph Kariuki, “Common Heritage, Diverse Interests: Deforestation and Conservation Alternatives for Mount Kenya,” *Les Cahiers d'Outre-Mer*, 235 (Juillet-Septembre 2006).
- [19] See, for example, “Rio Tinto chief says sorry for sacred caves blast; Australia starts inquiry,” Reuters, 12 June 2020; “Mining firm Rio Tinto sorry for destroying Aboriginal caves,” BBC (May 31, 2020).
- [20] *Id.*
- [21] “CHRB response to the destruction of a 46,000-year-old Aboriginal heritage site by Rio Tinto at Juukan Gorge in Western Australia on 24 May 2020,” Corporate Human Rights Benchmark and the World Benchmarking Alliance (June 9, 2020).
- [22] “Brazil's indigenous people swear to fight for Amazon 'to last drop of blood,’” Reuters (23 August 2019); “Brazilian Indigenous People speak out as Amazon fires rage,” PBS (Aug. 29, 2019); “Rainforest Mafias: How Violence and Impunity Fuel Deforestation in Brazil's Amazon,” Human Rights Watch (Sept. 17, 2019). See also, Urzedo, Danilo & Chatterjee, Praticchi, “The Colonial Reproduction of Deforestation in the Brazilian Amazon: Violence Against Indigenous Peoples for Land Development,” *Journal of Genocide Research* (2021).
- [23] “Brazil: Criminal Networks Target Rainforest Defenders,” Human Rights Watch (Sept. 17, 2019); “There's no doubt that Brazil's fires are linked to deforestation, scientists say,” *Science Magazine* (Aug. 26, 2019).
- [24] “Rainforest Mafias: How Violence and Impunity Fuel Deforestation in Brazil's Amazon,” Human Rights Watch (Sept. 17, 2019); “Mura Indigenous Tribe Vows to Protect Sacred Amazon Land,” Telesur (Aug. 23, 2019).
- [25] “Rainforest Mafias: How Violence and Impunity Fuel Deforestation in Brazil's Amazon,” Human Rights Watch (Sept. 17, 2019).
- [26] ICC, *Prosecutor v. Al Mahdi*, ICC-01/12-01/15-171, Judgment and Sentence, para. 64 (Sept. 27, 2016); ICC, *Prosecutor v. Al Hassan*, ICC-01/12-01/18-2-tENG, Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud, (March 27, 2018); ICC Press Release, “Al Hassan case: ICC Pre-Trial Chamber I confirms charges of war crimes and crimes against humanity and commits suspect to trial” (Sept. 30, 2019).
- [27] *Rome Statute*, Article 8(2)(b)(ix) and 8(2)(e)(iv).
- [28] *Rome Statute*, preamble.
- [29] ICC, *Prosecutor v Al Mahdi*, Case No. ICC-01/12-01/15-236, Reparations Order, para. 134 (Aug. 17, 2017).
- [30] ICC, *Prosecutor v. Al Mahdi*, Case No. ICC-01/12-01/15-1-Red, Mandat d'arrêt à l'encontre d'Ahmad AL FAQI AL MAHDI (Sept. 18, 2015).
- [31] *International Covenant on Economic, Social and Cultural Rights* (ICESCR), Article 15(1)(a) (1976).
- [32] *ICESCR*, Article 15(2).
- [33] *Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment*, ETS 150 – Environment, 21.VI.1993, Art. 2(10) (1993).
- [34] Committee on Economic, Social and Cultural Rights, General Comment No. 21, “Right of Everyone to Take Part in Cultural Life” (art. 15, para. 1(a), of the *International Covenant on Economic, Social and Cultural Rights*, para 50, UN Doc. E/C.12/GC/21 (Dec. 21, 2009).
- [35] Inter-American Commission on Human rights, *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II, Doc. 56/09, para. 2 (Dec. 30, 2009) (<https://www.oas.org/en/iachr/indigenous/docs/pdf/ancestrallands.pdf>).
- [36] Inter-American Court of Human Rights, *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment of June 17, 2005 (Merits, Reparations and Costs), para. 146.
- [37] ICC, Office of the Prosecutor, Policy Paper on Case Selection and Prioritisation, para. 41 (Sept. 15, 2016).
- [38] *Rome Statute*, Art. 7(1)(d).
- [39] *Rome Statute*, Art. 7(2)(d).
- [40] ICC, “Request under Regulation 46(3) of the Regulations of the Court, Decision on the ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute,’” ICC-RoC46(3)-01/18-37, para. 55 (Sept. 6, 2018).
- [41] “Amazon fires jeopardize indigenous tribes living without contact with the world,” The Amazon Conservation Team (Sept. 20, 2019).
- [42] ICC, *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/ Republic of the Union of Myanmar, ICC-01/19-27, para. 99 (Nov. 14, 2019).

- [43] See, for example, *Free Prior and Informed Consent – An Indigenous Peoples’ right and a good practice for local communities* – FAO, UN Department of Economic and Social Affairs Indigenous Peoples (Oct. 14, 2016).
- [44] ICC, *Elements of Crimes*, Article 7(1)(d), p. 4, 5.
- [45] ICC, *Prosecutor v. Ruto et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, paras. 244, 245 (Jan. 23, 2012).
- [46] ICC, *Prosecutor v. Ruto et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, para. 251 (Jan. 23, 2012).
- [47] ICC, *Request under Regulation 46(3) of the Regulations of the Court*, Decision on the ‘Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute,’ ICC-RoC46(3)-01/18-37, para. 61 (Sept. 6, 2018).
- [48] ICC, *Elements of Crimes*, Article 7(1)(d), p. 4, 5.
- [49] See, ICC, *Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar*, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, ICC-01/19-27, Nov. 14, 2019 para. 98 (Nov. 14, 2019).
- [50] See, *Rome Statute*, Art. 7; ICC, *Elements of Crimes*, Article 7(1)(d), p. 4, 5.
- [51] See, note 22 above.
- [52] See, note 14 above.
- [53] *Free Prior and Informed Consent – An Indigenous Peoples’ right and a good practice for local communities* – FAO, UN Department of Economic and Social Affairs Indigenous Peoples (Oct. 14, 2016).
- [54] “Traditional owners say Rio Tinto knew importance of caves razed for mine,” Reuters (June 5, 2020); “Film reveals Rio Tinto knew community dissent before Pilbara heritage site blast,” S&P Global (June 3, 2020).
- [55] “India: ‘When Land is Lost, Do We Eat Coal?’: Coal Mining and Violations of Adivasi Rights in India, Amnesty International (July 13, 2016); How Jharkhand govt broke law by taking fertile land from farmers for Adani, Business Standard (Dec. 3, 2018).
- [56] ICC, Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation*, para. 41 (Sept. 15, 2015).