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Combating Violence against Indigenous Women and Girls: Article 22 of the United Nations Declaration on the Rights of Indigenous Peoples

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Addressing Violence against Native American Women and Girls as a Human Rights Issue

By

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This paper is submitted to the United Nations Permanent Forum on Indigenous Issues for the International Expert Group Meeting to provide information on addressing violence against indigenous women and girls as a human rights issue, specifically violence against American Indian and Alaska Native women and girls in the United States (Native or Indian women). The first section of this paper provides background information on the epidemic of violence against Native women in the United States. The second section explains how United States domestic law contributes to this human rights crisis. The third section describes how the United States' failure to protect Native women is a violation of its obligations under international human rights law to prevent violence against Native women.

I. Violence Against Native Women and Girls in the United States is a Human Rights Crisis

Violence against Native women and girls in the United States has reached epidemic proportions and is a human rights crisis. Native women face greater rates of domestic violence and sexual assault than any other group in the United States.¹ The jurisdictional limitations that United States law places on Indian nations have created an unworkable and discriminatory race-based system for administering justice in Native communities. This system denies Native people, particularly Native women, their right to life, security, equal treatment under the law, and access to meaningful and effective judicial remedies.

Violence against Native women and girls greatly exceeds that of any other population in the United States.² Native women are 2.5 times more likely to experience violence than other women in the United States.³ The statistics of the United States Department of Justice report that 1 in 3 Native women will be raped, and 3 in 5 will be physically assaulted in their lifetime.⁴ Native women are also stalked at a rate more than twice that of any other population.⁵

Native women experience a per capita rate of interracial violence that greatly exceeds that of the general population. United States Department of Justice statistics reflect a high number of interracial crimes, with white or black offenders committing 88% of all violent victimizations of Native women from 1992 to 2001.⁶ Nearly 4 of 5 Native victims of sexual assault described the offender as white.⁷ Three out of 4 Native victims of intimate partner violence identified the offender as a person of a different race.⁸

¹ See, e.g., P.L. No. 109-162 § 901 (2006).

² *Id.*

³ See Steven W. Perry, U.S. Dep't of Justice, American Indians and Crime 8 (2004).

⁴ See Patricia Tjaden & Nancy Thoenne, U.S. Dep't of Justice, Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey 22 ex. 7 (2000).

⁵ See U.S. Dep't of Justice, Domestic Violence and Stalking, The Second Annual Report to Congress Under the Violence Against Women Act (1997); U.S. Dep't of Justice, Stalking and Domestic Violence, The Third Annual Report to Congress Under the Violence Against Women Act (1998).

⁶ Patricia Tjaden & Nancy Thoenne, U.S. Dep't of Justice, Prevalence, Incidence, and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey 22 (2000).

⁷ See *id.* at 9.

⁸ Lawrence A. Greenfield & Steven K. Smith, U.S. Dep't of Justice, American Indians and Crime 8 (1999) (noting that among American Indian victims, "75% of the intimate victimizations and 25% of the family

II. How United States Law Contributes to this Human Rights Crisis

There are 565 federally recognized Indian tribal governments in the United States, including more than 200 Alaska Native villages (Indian nations),⁹ which retain sovereign authority over their lands and peoples.¹⁰ These Indian nations are pre-existing sovereigns that possess inherent authority over their people and territory, including power “necessary to protect tribal self-government [and] to control internal relations.”¹¹ Indian nations also have such additional authority as Congress may expressly delegate.¹² The basis for tribal authority is the inherent need to determine tribal citizenship, to regulate relations among citizens, and to legislate and tax activities on Indian lands, including certain activities by non-citizens.¹³ Indian nations have broad legislative authority to make decisions impacting the health and safety of the community, including exercising criminal and civil jurisdiction to respond to violence against women and provide services for victims. Tribal law enforcement officials are often the first and most effective responders to violence against women committed within their communities.

The United States, without the agreement of or consultation with Indian nations, imposed legal restrictions upon the inherent jurisdictional authority that Indian nations possess over their respective territories. These restrictions have created systemic barriers that deny Indian women equal treatment and access to justice and prevent them from living free of violence or the threat of violence.

Unlike other governments and local communities in the United States, Indian nations cannot investigate and prosecute most violent offenses occurring in their communities. Significantly, Indian nations are unable to effectively protect Indian women from violence in their territories through adequate policing and effective judicial recourse against violent crimes because they cannot prosecute non-Indian offenders.¹⁴ Moreover, even where prosecutions can proceed, Indian nations can only sentence Indian offenders to prison terms of up to three years per offense, not to exceed a term of imprisonment greater than nine years.¹⁵

victimizations involved an offender of a different race,” a much higher percentage than among victims of all races as a whole).

⁹ See Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 75 Fed. Reg. 60810 (Oct. 1, 2010), *supplemented by* 75 Fed. Reg. 66124 (Oct. 27, 2010).

¹⁰ *Babbitt Ford, Inc. v. Navajo Indian Tribe*, 710 F.2d 587, 591 (9th Cir. 1983) (quoting *United States v. Wheeler*, 435 U.S. 313, 323 (1978)) (“Indian tribes have long been recognized as sovereign entities, ‘possessing attributes of sovereignty over both their members and their territory.’”). See also *Worcester v. Georgia*, 31 U.S. 515 (1832); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

¹¹ *Montana v. United States*, 450 U.S. 544, 564 (1981). See also Cohen’s Handbook on Federal Indian Law §4.01[1][a] (Nell Newton ed. 2005); Vine Deloria, Jr. & David E. Wilkins, *Tribes, Treaties, and Constitutional Tribulations* 26 (1999) (describing the constitutional status of tribal governments, which existed prior to and independent of the United States Constitution).

¹² *Strate v. A-1 Contractors*, 520 U.S. 438 (1997).

¹³ *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*, 554 U.S. ____ (2008), available at <http://supreme.justia.com/us/554/07-411/>.

¹⁴ *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978).

¹⁵ Tribal Law and Order Act of 2010, P.L. No. 111-211 (2010). This enhanced tribal court sentencing authority comes with additional requirements for tribal court criminal proceedings that, as a practical matter, may be fiscally prohibitive for many Indian nations such as requiring that Indian nations: provide

These limitations are a key factor creating and perpetrating the disproportionate violence against Indian women.¹⁶ As a result, Indian women cannot rely upon their tribal governments for safety or justice services and are forced to seek recourse from foreign federal or state government agencies. The response of federal and state agencies is typically inadequate given the disproportionately high number of domestic and sexual violence crimes committed against Indian women.¹⁷

The major legal barriers obstructing the ability of Indian nations to enhance the safety of women living within their jurisdictional authority include:

- a. The United States' assumption of federal jurisdiction over certain felony crimes under the Major Crimes Act (1885);
- b. The removal of criminal jurisdiction over non-Indians by the U.S. Supreme Court in *Oliphant v. Suquamish Tribe* (1978);
- c. The imposition of a one-year, per offense, sentencing limitation upon tribal courts by the U.S. Congress through passage of the Indian Civil Rights Act (1968);¹⁸
- d. The transfer of criminal jurisdiction from the United States to certain state governments by the U.S. Congress through passage of Public Law 53-280 and other similar legislation (1953); and
- e. The failure to fulfill treaties signed by the United States with Indian nations as recognized by the court in *Elk v. United States* in 2009.

Due to these legal restrictions imposed by the United States federal government on Indian nations, criminal jurisdiction on Indian lands is divided among federal, tribal, and state governments. Which government has jurisdiction depends on the location of the crime, the type and severity of the crime, the Indian status of the perpetrator, and the Indian status of the victim. The complexity of this jurisdictional arrangement contributes to violations of women's human rights because it treats Indian women different from all other women and causes confusion over who has the authority to respond to, investigate, and prosecute violence against Indian women. In no other jurisdiction within the United States does a government lack the legal authority to prosecute violent criminal offenses illegal under its laws.

For the last thirty years, Indian nations have been denied criminal jurisdiction over non-Indians and the authority to prosecute non-Indians committing crimes on Indian lands. When a non-Indian commits physical or sexual violence against an Indian woman on Indian

defendants with a right to effective assistance of counsel; at the expense of the Indian nation, provide indigent defendants with a defense attorney licensed to practice law by any jurisdiction in the United States; and provide legally trained and licensed judges to preside over such criminal proceedings. *Id.* at Section 234.

¹⁶ Amnesty International, *Maze of Injustice: The Failure to Protect Indigenous Women from Sexual Violence in the USA 2, 6-8* (April 2007), available at [www.amnesty.org.ru/library/pdf/AMR510352007ENGLISH/\\$File/AMR5103507.pdf](http://www.amnesty.org.ru/library/pdf/AMR510352007ENGLISH/$File/AMR5103507.pdf) (finding that there is a clear pattern of discriminatory and inadequate law enforcement in cases of violence against Indian women) [hereinafter "Maze of Injustice"].

¹⁷ *Id.* at 8.

¹⁸ *But see* P.L. No. 111-211 (2010) (expanding tribal court sentencing authority under ICRA to three years when specific conditions are met).

lands, the Indian nation does not have the authority to prosecute the offender. Yet, nationally, non-Indians commit 88% of all violent crimes against Indian women.¹⁹ Either the United States, or—in cases where the United States has delegated this authority to the state—the state government, has the authority to prosecute non-Indian offenders committing crimes on Indian lands. Shamefully, federal authorities, who are often the only law enforcement officials with the legal authority to investigate and prosecute violent crimes in Indian communities, have regularly failed to do so.²⁰ State prosecution records also are inadequate.²¹

According to a recent United States Government Accountability Office study, from 2005 through 2009, U.S. attorneys failed to prosecute 52% of all violent criminal cases, 67% of sexual abuse cases, and 46% of assault cases occurring on Indian lands.²² As these numbers indicate, Indian women are routinely denied their right to adequate judicial recourse. This treatment separates Indian women from all other groups under the law. The United States' restriction of tribal criminal authority, combined with its failure to effectively police and prosecute these violent crimes, violates its obligation to act with due diligence to protect Indian women from violence and punish perpetrators not only pursuant to its recognized trust relationship with Indian nations, but also in accordance with its international human rights obligations.

Also contributing to the human rights crisis is the fact that United States law limits tribal authority over Indian perpetrators on their own lands.²³ Indian nations have concurrent criminal authority with the federal government under the Major Crimes Act and may prosecute crimes committed by Indians.²⁴ However, under the recently amended Indian Civil Rights Act (ICRA), tribal courts can only sentence Native offenders to prison terms not greater than 3 years per offense (with a total of 9 years for consecutive sentences for separate offenses) and a fine of up to \$15,000. This limitation holds true even when sentencing for the most severe crimes. Moreover, this enhanced sentencing authority for Indian nations can only be exercised when certain protections are provided to the accused. While a tremendous step forward for some Indian nations, the reality is that most tribes do not have the resources to meet the requirements under the Act and are thus still limited to the one year sentencing cap under ICRA.

¹⁹ Patricia Tjaden & Nancy Thoenne, U.S. Dep't of Justice, *Prevalence, Incidence, and Consequences of Violence Against Women: Findings From the National Violence Against Women Survey 22* (2000).

²⁰ Mary Claire Jalonick, *DOJ Will Not Provide Indian Crime Data*, News From Indian Country (Sept. 2008), available at http://indiancountrynews.net/index.php?option=com_content&task=view&id=4641&Itemid=33.

²¹ Like the United States government, states often fail to investigate promptly and thoroughly reports of violence against Indian women let alone prosecute such criminal cases occurring within Indian lands. The criticisms of United States prosecutors and their failure to prosecute violent crimes also apply to state prosecutors. The failure to prosecute crimes occurring on Indian lands, however, is often more acute in these states because they do not receive any additional funding from the United States to handle these cases. This often results in the understaffing of police on Indian lands and reluctance on the part of state prosecutors to take cases.

²² United States Government Accountability Office, U.S. Department of Justice *Declinations of Indian Country Criminal Matters 3* (December 13, 2010).

²³ 18 U.S.C. §§ 1152, 1162 (providing for federal jurisdiction over crimes in Indian country).

²⁴ 18 U.S.C.A. §§ 1152, 1153; *see also United States v. Kagama*, 118 U.S. 375 (1886) (upholding the constitutionality of the Major Crimes Act).

In sum, the complexity of this jurisdictional arrangement under United States law contributes to violations of Native women's human rights by denying Native women rights to:

1. Equality and equal protection of the laws by subjecting them to a law enforcement scheme distinct from all others in the United States;
2. Life and security by allowing perpetrators to commit acts of rape and domestic violence without legal consequence for their violence; and
3. Access to justice by denying them legal recourse and allowing an ongoing pattern of violence that often increases in severity and frequency over time, sometimes resulting in homicide.

III. The United States' Failure to Protect Native Women Violates its Obligations under International Human Rights Law

The international community has universally condemned violence against women as a human rights violation. Violence against women violates many of the rights enshrined in international human rights treaties and declarations, including, *inter alia*, women's rights to life, security, freedom from inhumane treatment, discrimination, equal protection under the law, and access to effective judicial remedies. These rights are protected by countless human rights instruments, including, *inter alia*, the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women; American Declaration of the Rights and Duties of Man; American Convention on Human Rights; International Convention on the Elimination of All Forms of Racial Discrimination; UN Convention on the Elimination of All Forms of Discrimination Against Women; UN Declaration on the Elimination of Violence Against Women; and the UN Declaration on the Rights of Indigenous Peoples.

The epidemic of violence against Native women exists primarily because of discriminatory United States law and policy. The jurisdictional scheme which permits perpetrators to commit crimes of sexual and domestic violence with impunity on Native nation lands essentially condones violence against Native women and denies them the right to equal protection under both United States and international law. When the United States ignores ongoing systemic problems relating to crimes in Indian country, it does so in direct violation of various international principles and of the human rights of Native American women under international law.

The United States is a party to, and bound by, both the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Covenant on Civil and Political Rights (ICCPR). ICERD, Article 5, Section B, provides that regardless of race, all peoples should be guaranteed their right to "security of person and protection by the State against violence or bodily harm." By encouraging a jurisdictional scheme where 1 in 3 Native women will be raped with impunity, the United States' actions deny the rights recognized in Article 5(B), as well as freedom from racial discrimination (Article 2), equal protection under the law (Article 5(a)), and access to effective judicial remedies (Article 6). Recognizing this, the Committee on the Elimination of Racial Discrimination (CERD) recently condemned the United States for its inadequate response to violence against Native women. In its 2008 Concluding Observations and Report, the Committee stated:

The Committee also notes with concern that the alleged insufficient will of federal and state authorities to take action with regard to such violence and abuse often deprives victims belonging to racial, ethnic and national minorities, and in particular Native American women, of their right to access to justice and the right to obtain adequate reparation or satisfaction for damages suffered (arts. 5(b) and 6).²⁵

It also recommended that the United States increase its efforts to prevent and prosecute perpetrators of violence against women. The United States has yet to comply with the Committee's recommendations.

Article 3 of the International Covenant on Civil and Political Rights (ICCPR) provides that civil and political rights are guaranteed to *both* men and women. In living lives impacted by daily violence, Native women are thwarted in their ability to realize many of their civil and political rights guaranteed in the ICCPR. As the preamble of the ICCPR asserts, "in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and *freedom from fear* and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights." (emphasis added). The United States violates its international human rights obligations by creating conditions for the commission of crimes of violence against Native women with impunity, thus jeopardizing Native women's rights to life, security, discrimination, equal protection, and access to effective judicial remedies.

Most recently, just one year ago, on December 16, 2010, President Obama announced the United States' support of the United Nations Declaration on the Rights of Indigenous Peoples. Significantly, Article 22(2) of the Declaration speaks directly and unequivocally to the United States' obligation to ensure the safety of Native women: "States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination." More often than not, however, the United States fails to fulfill this promise, leaving Indian nations with minimal recourse while their women are violated and their communities torn apart.

Under customary international human rights law, every state has an obligation to act with due diligence to respect, promote, and protect basic human rights and to prevent human rights violations. When states fail to do so, they can be held responsible for human rights violations perpetrated by non-state actors. For example, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have repeatedly held that states must exercise due diligence to prevent human rights violations, especially violence against women.²⁶ Customary international law also "obligates states to prevent and respond

²⁵ Committee on the Elimination of Racial Discrimination, Concluding Observations United States of America, CERD/C/USA/CO/6 (February 2008) at para. 26, available at <http://www.indianlaw.org/sites/indianlaw.org/files/CERD-recommendations.pdf>.

²⁶ IACHR, *Report on Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser.L/VIII, Jan. 20, 2007, at paras. 29-30; Inter-Am. Ct. H.R., Case of Velásquez-Rodríguez v. Honduras, Judgment of July 29, 1988, para. 173.

to acts of violence against women with due diligence.”²⁷

Global attention has recently been directed toward this ongoing human rights crisis. In January 2011, Rashida Manjoo, the UN Special Rapporteur on Violence Against Women, conducted an in-depth investigation of violence against women in the United States, including violence against Native American women. In October 2011, Ms. Manjoo presented her report to the General Assembly of the United Nations in New York City. The report cites restrictions placed on tribes’ criminal jurisdictional authority as one of the causes of the extremely high rate of violence against Native women.

The Inter-American system has likewise taken note of the violence against Native women epidemic. Very recently, on October 25, 2011, the Inter-American Commission on Human Rights called attention to this issue by holding a thematic hearing on “Violence Against Native Women in the United States.” The testimony that was provided at the hearing illustrated grave violations by the United States of the American Declaration of the Rights and Duties of Man, of which the United States is a party. Article XVIII of the American Declaration on the Rights and Duties of Man states, “Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.” The United States violates these principles by perpetuating a situation where Indian nations cannot investigate and prosecute violent offenses occurring on their lands and against their citizens. Because of the limited criminal authority of tribes, tribes and Native women must rely on the federal government to investigate and prosecute violent felonies. Yet, more often than not, the United States government fails to investigate and prosecute violent felonies committed on Indian lands. The Inter-American Commission on Human Rights has found that a state’s failure to properly investigate and prosecute violent offenses against women violates Article XVIII of the American Declaration.²⁸

The failure of the United States to punish perpetrators of violence against Native women also undermines their rights to life and security of the person under Article I of the American Declaration. As the Commission pointed out in *Maria da Penha Maia Fernandes v. Brasil*, “general and discriminatory judicial ineffectiveness . . . creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts.”²⁹ Such a

²⁷ Report of the Special Rapporteur on violence against women, its causes and consequences, The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, E/CN.4/2006/61 (20 Jan. 2006) at para. 29.

²⁸ IACHR, *Maria da Penha v. Brasil*, Case 12.051, Report No. 54/01, OEA/Ser.L/V/II.111 Doc. 20 rev. at 704, para. 55 (April 16, 2001). In *Maria da Penha Maia Fernandes v. Brasil*, the Commission explained:

The failure to prosecute and convict the perpetrator under these circumstances is an indication that the State condones the violence suffered by Maria da Penha, and this failure by the Brazilian courts to take action is exacerbating the direct consequences of the aggression by her ex-husband. Furthermore, as has been demonstrated earlier, that tolerance by the State organs is not limited to this case; rather, it is a pattern. The condoning of this situation by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women.

²⁹ *Id.* at para. 56.

climate endangers the lives of women. In the United States, where most violent perpetrators of violence against Native women go unpunished, the majority of Native women will have their lives interrupted by violence. Many feel that a violent attack is inevitable. An advocate for survivors of sexual abuse from a tribe in Minnesota describes it not as a question of *if* a young Native woman is raped, but *when*. Studies show that violent offenders are likely to commit additional acts of violence when they are not held responsible for their crimes. Dr. Lisak, a leading researcher on sexual assault predators in the United States, described the inherent danger the United States' inadequate response presents to the lives of Native women when he stated, "Predators attack the unprotected. The failure to prosecute sex crimes against American Indian women is an invitation to prey with impunity."³⁰

States have an obligation to use all legal means at their disposal to combat human rights violations because "impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives."³¹ The inadequate response of the United States in addressing the epidemic of violence against Native women not only leaves these women and girls vulnerable and largely defenseless to attacks, but it also perpetuates a cycle of violence in Indian country and adversely impacts entire Indian nations, which already suffer from the worst socio-economic status of any population in the United States. While the United States has made some strides in the last few years to prevent violence against Native women, unquestionably, the United States has not used all the legal means at its disposal to combat human rights violations occurring against Native women and girls. Despite its awareness of this epidemic of violence, the United States continues to violate the rights of Native women to life, security, freedom from inhumane treatment, discrimination, equal protection under the law, and access to effective judicial remedies—rights protected by countless human rights instruments.

³⁰ David Lisak & P.M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 *Violence and Victims* 1 (2002).

³¹ IACHR, *Report on Access to Justice for Women Victims of Violence in the Americas*, OEA/Ser.L/VIII, Jan. 20, 2007, p. 12 (citing Inter-Am. Ct. H.R., *Loayza Tamayo Case. Reparations* (Art. 63(1) American Convention on Human Rights), Judgment of November 27, 1998, para. 170, citing Inter-Am. Ct. H.R., *The "Panel Blanca" Case* (Paniagua Morales et al.), Judgment of March 8, 1998, para. 173).