

# **Self-Determination and Self-Government: Using the UN Declaration to End Violence Against Native Women**

CONFERENCE ON:

**“The Significance of the UN Declaration on the Rights of Indigenous Peoples”**

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This paper is submitted to the United Nations Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, to provide information on the rights of self-determination and self-government and about violence against American Indian and Alaska Native women and girls in the United States (Native women)—violence that has reached epidemic levels in Indian country and Alaska Native villages.

## **I. The Declaration—An Historic Affirmation of Indigenous Rights**

Since President Obama’s announcement of the United States’ support over a year ago, no country in the world now opposes the UN Declaration on the Rights of Indigenous Peoples (Declaration). As President Obama then stated, “[w]hat matters far more than words . . . are actions to match those words.” Today, the Declaration stands not only as an historic affirmation of the rights of indigenous peoples, but also as an agenda for Indian and Alaska Native nations and the United States to address important issues in this country.

### **A. Self-Determination and Self-Government Rights**

In many ways, the Declaration offers promise to help end violence against Native women and to strengthen the ability of indigenous nations to address violence against Native women. Article 3 proclaims that indigenous peoples have the right to self-determination. The Declaration goes on to provide a fuller right of self-determination to tribal governments in Articles 4, 5, and 21, a right essential to the enjoyment of human rights and the preservation and well-being of indigenous peoples. The Declaration recognizes the rights of indigenous peoples “to self-government in matters relating to their internal and local affairs” (Article 4); “to maintain and strengthen their . . . political, legal economic, social and cultural institutions” (Article 5), and “to maintain and develop their political, economic and social systems or institutions. . . .” (Article 21).

Although the Declaration does not define self-determination, the right of self-determination must include the ability of indigenous peoples to develop and maintain their institutional structures, including their judicial, public safety, and law enforcement systems. These are exactly the types of institutional structures that help all governments, including tribal governments, to increase public safety and, significantly, to deter violence in their communities. Moreover, the right of indigenous peoples to the improvement of their social conditions, including but not limited to education, health, and housing, must include the provision of essential services to combat violence against Native women and to provide basic services to survivors of such violence. Today, many tribes very often lack the resources to provide essential programs to combat violence against women and to provide these basic services to survivors of such violence.

Article 35 of the Declaration recognizes the right of indigenous peoples “to determine the responsibilities of individuals to their communities.” This speaks directly in support of restoring and clarifying the jurisdiction of tribal governments to deter and respond to violence perpetrated in their communities by any person. This aspect of the rights of self-determination and self-government recognizes the right of Indian tribes to protect women within their communities from violence, to make their own laws determining what conduct is unlawful, and to require that all persons—Indian or non-Indian—abide by such tribal laws.

## **B. Rights of Native Women and Special Concerns of Native Women**

The Declaration affirms the rights of Native women both as individuals and as members of indigenous communities, including rights to gender equality, security of the person, and access to justice. Article 2 of the Declaration reinforces nondiscrimination, specifically extending it to indigenous peoples and declaring that indigenous peoples are “free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination . . . in particular that based on their indigenous origin or identity.” Article 44 broadly recognizes the equal rights of Native women, including their rights, *inter alia*, to political participation, education, and employment.

Article 22 of the Declaration calls for “[p]articular attention to be paid to the rights and special needs of indigenous . . . women . . . in the implementation of this Declaration.” Finally, violence against Native women and children is specifically addressed in Article 22(2): “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.”

## **II. Violence Against Native Women—Current United States Law and the Declaration**

Significant areas of federal policy and law do not comport with the standards of the Declaration with respect to protecting Native women and children against violence and ensuring nondiscrimination and equality under federal law. The right to be free of violence is a basic human right under international law,<sup>1</sup> and the epidemic level of violence against Native women is a human rights crisis. Native women are two and a half times more likely to be assaulted in their lifetime and

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<sup>1</sup> See, e.g., *Jessica Lenahan (Gonzales) v. United States (August 17, 2011)*. In the *Gonzales* case, the Inter-American Commission on Human Rights heard the first complaint brought by a domestic violence survivor against the United States and determined that the United States violated its obligations under international human rights law by failing to use due diligence and reasonable measures to protect this woman and her children from domestic violence.

more than twice as likely to be stalked than other women in the United States.<sup>2</sup> One in three Native women will be raped in their lifetime, and six in ten will be physically assaulted.<sup>3</sup> The murder rate for Native women is ten times the national average on some reservations.<sup>4</sup> Native women also experience a per capita rate of interracial violence far exceeding that of the general population with about 88% of the offenders identified by Native women survivors as being non-Indian.<sup>5</sup> Finally, the actual incidence of violence against Native women is considered to be even higher due to under-reporting.

Although the United States recognizes that federally recognized tribal governments have inherent sovereign authority and self-government over their territories and people, the United States has unilaterally limited their ability to protect Native women from violence and to provide them with meaningful remedies. United States law places systemic jurisdictional restrictions on Native nations, creating an unworkable and discriminatory race-based system for administering justice in Native communities—a system highlighting this country’s failure to meet the standards of the Declaration.

Tribal efforts to ensure the safety of Native women are systemically thwarted by federal laws such as the Major Crimes Act, under which the federal government assumed jurisdiction over certain felony crimes by Indians against Indians within Indian country, and Public Law 53-280 (PL 280), which transferred criminal jurisdiction over crimes occurring in Indian country from the United States to certain states. Even when tribal governments exercise jurisdiction over crimes by an Indian against an Indian, the Indian Civil Rights Act generally imposes a one-year sentencing limitation per offense upon tribal courts no matter how heinous the crime.<sup>6</sup> In 2010, the Tribal Law and Order Act (TLOA) amended the Indian Civil Rights Act to allow tribal courts to exercise enhanced sentencing authority—up to 3 years imprisonment and/or a \$15,000 fine per offense—but only if they provide a number of protections for defendants, including: defense counsel for indigent defendants, law trained and licensed judges, detention facilities certified for long-term detention, and publicly available tribal codes. At a time when it seems certain that more resources will be needed for the vast majority of tribes to increase their capacity to meet these requirements, the 2012 federal budget cut millions of dollars from TLOA programs aimed at strengthening tribal justice programs.<sup>7</sup>

The key contributing cause of this violence is the United States Supreme Court’s stripping of criminal jurisdiction over non-Indians from tribes.<sup>8</sup> This has an especially negative impact because, unlike any other group of women in the United States, the overwhelming majority—some 88%—of Native women identify their attackers as non-Indian.<sup>9</sup> Moreover, according to the 2010 Census, a growing majority of the people residing in Indian country or Alaska Native villages are non-Native.

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<sup>2</sup> See, e.g., P.L. No. 109-162 § 901 (2006); see also 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).

<sup>3</sup> 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).

<sup>4</sup> See GAO, *Indian Country Criminal Justice: Departments of the Interior and Justice Should Strengthen Coordination to Support Tribal Courts*, GAO-11-252, at 5 (October 2011).

<sup>5</sup> See 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 9 and 22 (2000).

<sup>6</sup> 25 U.S.C. § 1302.

<sup>7</sup> Public Law 112-55.

<sup>8</sup> *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978).

<sup>9</sup> Steven W. Perry, U.S. Dep’t of Justice, *American Indians and Crime* 8 (2004).

Some 77% of all people living in American Indian areas (Indian reservations and/or off-reservation trust lands) and 68% of all people living in Alaska Native villages did not identify as American Indian or Alaska Native.<sup>10</sup> Further, the Census Bureau reported that 50% of all Native American married women have non-Indian husbands.<sup>11</sup> All this makes tribes the only governments in the U.S. unable to investigate and prosecute most of the violent offenses in their communities.

These systemic limitations imposed by United States law create an unjust, life-threatening jurisdictional maze requiring a case-by-case analysis of the status of the land where each crime occurred, the type of crime, and the race of both the perpetrator and victim. This race-based scheme threatens the safety of Native women daily and violates their human rights by treating them differently from all other women and creating confusion about which government—federal, tribal, or state—has legal authority to respond to, investigate, and prosecute crimes. A 2010 GAO study documented shamefully high federal declination rates for prosecuting such crimes, with U.S. attorneys declining to prosecute 67% of the Indian country matters referred to them that involved sexual abuse and related matters. Under PL 280, which impacts the criminal justice systems for 51% of tribes in the lower-48 and potentially affects all Alaska Natives and their villages, Indian leaders and advocates have raised urgent concerns about the failure of states to respond to and prosecute crimes in Indian country under this law, especially those involving violence against Native women. The situation in Alaska is especially grim, as many Alaska Native communities have no form of law enforcement whatsoever.

While jurisdiction is muddled, some things are clear. The systemic erosion of the criminal authority of tribes over all persons committing crimes within their jurisdictions, coupled with a shameful record of investigation, prosecution, and punishment of these crimes by federal and state governments, allows criminals to act with impunity in Indian country, threatens the lives of Native women daily, and perpetuates an escalating cycle of violence in Native communities. United States law denies Native people on Indian lands, especially Native women, their rights to life, security, equal treatment under the law, and access to meaningful judicial remedies. In sum, Native women who are subjected to violence should not be treated differently and discriminated against just because they were assaulted on an Indian reservation.

### **III. Proposals for Reform**

While the United States has taken some important steps<sup>12</sup> towards addressing the epidemic of violence against Native women, much more needs to be done to end this human rights crisis and to implement the Declaration.<sup>13</sup> We suggest that the United States could improve the current situation by:

1. Restoring the authority of Indian nations to prosecute non-Indians committing crimes in Indian country, particularly violent and sexual crimes against Native women, and clarifying

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<sup>10</sup> *2010 Census Briefs, The American Indian and Alaska Native Population: 2010*, at 14 (January 2012).

<sup>11</sup> *Laws “Not Enough” to Tackle Violence Against Women*, Inter Press Service Report by Kanya D’Almeida (July 31, 2011)(quoting Kim Teehee, White House Senior Policy Advisor for Native American Affairs).

<sup>12</sup> The United States’ support of the UN Declaration on the Rights of Indigenous Peoples is significant for the protection of Native women. The United States also has made some strides to prevent violence against Native women with the enactment of Title IX of the Violence Against Women Act in 2005 and the TLOA in 2010.

<sup>13</sup> We incorporate by reference the recommendations for combating violence against Native women in the 2011 Report by the UN Special Rapporteur on Violence Against Women, Its Causes and Consequences, written by Rashida Manjoo.

that every tribe has full civil jurisdiction to issue and enforce protection orders involving all persons, Indian and non-Indian alike;<sup>14</sup>

2. Increasing federal technical, financial, and other support to Indian nations who wish to exercise restored criminal jurisdiction over non-Indians to enhance their response to violence against Native women, including support for tribes sharing concurrent state criminal jurisdiction under PL 280;
3. Bringing federal assault statutes into parity with state laws governing violence against women, especially with respect to severe acts of violence against Native women resulting in substantial bodily injury and involving strangling, suffocating, and assaulting a spouse, intimate partner, or dating partner;<sup>15</sup>
4. Fully funding and implementing the TLOA, particularly with respect to the exercise of enhanced sentencing authority by Indian nations; the obligation of federal prosecutors to share information on declinations of Indian country cases; and the provision of training for and cooperation among tribal, state, and federal agencies;
5. Increasing support and sufficient funding streams for culturally appropriate services designed by tribal providers, with input from tribal coalitions, for Native women survivors of violence;
6. Creating a forum for dialogue, collaboration, and cooperation among tribal, federal, and state courts on the issue of violence against Native women on Indian lands and how the jurisdictional scheme under United States law unjustly discriminates against Native women contrary to the Declaration; and
7. Launching a national initiative, in consultation with Indian nations, to examine and implement reforms to increase the safety of Native women living within tribal lands under concurrent tribal-state jurisdiction (PL 280 states), including responses to the request by Indian nations for the United States to reassume federal criminal jurisdiction and for technical and financial support to Indian nations within PL 280 states to combat violence against Native women.

We are grateful for the Special Rapporteur's commitment to the rights of indigenous peoples and Native women in the United States. We encourage the Special Rapporteur to conduct site visits to Indian nations throughout the United States to further investigate the epidemic of violence against Native women and its implications for the United States under the Declaration. We also request that the Special Rapporteur include in his country report recommendations for how the United States, in consultation with tribal governments, could better protect the human rights of Native women. Finally, we would welcome the opportunity to provide the Special Rapporteur more complete information on violence against Native women.

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<sup>14</sup> If enacted, bills pending in Congress such as S. 1925, the Violence Against Women Reauthorization Act, and S. 1763, the SAVE Native Women Act would be important steps in that direction by, among other things, restoring concurrent tribal criminal jurisdiction over non-Indian perpetrators of domestic violence, dating violence, and violations of protection orders that are committed in Indian country.

<sup>15</sup> *Id.*



## SUBMITTING ORGANIZATIONS

Founded in 1978 by American Indians, the **Indian Law Resource Center** is a 501(c)(3) non-profit legal organization. The Center assists indigenous peoples to combat racism and oppression, realize their human rights, protect their lands and environment, and achieve sustainable economic development and genuine self-government. The Center works throughout the Americas to overcome the devastating problems that threaten Native peoples by advancing the rule of law, by establishing national and international legal standards that preserve their human rights and dignity, and by providing legal assistance without charge to indigenous peoples fighting to protect their lands and ways of life. One of the Center's overall goals is to promote and protect the human rights of indigenous peoples, especially those human rights recognized in international law. The Center believes it is especially important to encourage the recognition of these human rights at the country level in order to preserve indigenous cultures and lives, and also to protect the environments where indigenous peoples live.

The **National Congress of American Indians (NCAI)** is the oldest and largest national organization of American Indian and Alaska Native tribal governments. As the collective voice of tribal governments in the United States, NCAI is dedicated to ending the epidemic of violence against American Indian and Alaska Native women. In 2003, NCAI created the NCAI Task Force on Violence Against Women to address and coordinate an organized response to national policy issues regarding violence against Indian women. The NCAI Task Force represents a national alliance of Indian nations and tribal organizations dedicated to the mission of enhancing the safety of American Indian and Alaska Native women.

The **National Indigenous Women's Resource Center, Inc. (NIWRC)** was established as a non-profit organization in 2011. Through a grant from the United States Department of Health and Human Services under the Family Violence Prevention and Services Act, the NIWRC provides technical assistance, policy development, training, public education, materials, and resource information for Indian and Alaska Native nations, Native Hawaiians, and Native non-profit organizations addressing safety for Native women. The NIWRC's primary mission is to restore safety for Native women.

**Clan Star, Inc. (CSI)**, a not-for-profit organization incorporated under the Eastern Band of Cherokee Indians in 2001, is devoted to improving justice to strengthen the sovereignty of indigenous women through legal, legislative, and policy initiatives, and, education and awareness. CSI provides technical assistance, training and consultation throughout the United States to Indian tribes and tribal organizations in the development of public policy strategies addressing violence against women. CSI was instrumental in the establishment of the National Congress of American Indians Task Force on Violence Against Women in 2003 and since that time, CSI staff have served as policy advisors to the Task Force. CSI has led national efforts in filing amicus briefs in key cases before the United States Supreme Court bearing on violence against Native women and has helped in the development of public policy leading to the enactment of Title IX, Safety for Indian Women in the Violence Against Women Act of 2005.