



***Maze of injustice: The failure to protect Indigenous women from sexual violence
in the USA***

FOCUS SHEET – Jurisdiction

In order to achieve justice, American Indian and Alaska Native survivors of crimes of sexual violence have to navigate a maze of tribal, state and federal law. The US federal government has created a complex interrelation between tribal, state and federal jurisdictions and justice systems that often allows perpetrators to evade justice.

Amnesty International recognizes the complexity of federal laws concerning criminal jurisdiction on tribal land. Amnesty International further recognizes that any brief summary cannot begin to provide an in-depth and comprehensive understanding of this complex area of law and that authoritative interpretation of these laws often differ. The summaries presented by Amnesty International should not be relied upon as a substitute for legal advice on federal Indian law. AI does not intend any statements in the report to be interpretative in any way that might be viewed to restrict the inherent sovereign authority of American Indian and Alaska Native Nations in the United States.

For purposes of this report and for determining jurisdiction according to federal law, there are at least three terms – “Indian”, “Indian country”, and “tribal land” that need to be clarified at the onset.

“Indian” – U.S. federal law generally defines an Indian for purpose of determining criminal jurisdictional authority as a member of a federally recognized Indian tribe. The term “Indian” in this context explicitly includes Alaska Natives since nearly half of the federally recognized tribes are Alaska Native Nations (more than 220 of the more than 550 federally recognized Indian tribes).

“Tribal land” - includes, but is not limited to, lands that qualify as “Indian country” under section 1151 of title 18 of the United States Code which provides that “Indian country” means:

- (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
- (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
- (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

While the term “Indian country” is used in federal statutes and federal case law, we are using the broader term “tribal land” to be more inclusive of the situation in Alaska where as

a result the unique way that land claims in Alaska were settled the US Supreme Court decided that the definition of "Indian Country" does not generally apply.

Issues of Jurisdiction

Three main factors determine where jurisdictional authority lies:

- Whether the victim is a member of a federally recognized Indian tribe or not);
- Whether the accused is a member of a federally recognized Indian tribe or not; and
- Whether the offence took place on tribal land or not.

It is also necessary to determine whether or not Public Law 280 (or other relevant federal statutes) have conferred jurisdiction upon the state. If not, then there is a need to determine whether or not the offense is a major crime as defined under federal law (Major Crimes Act).

The answers to these questions are often not self-evident. However, they determine (1) whether a crime should be investigated by tribal, federal and/or state police; (2) whether it should be prosecuted by a tribal prosecutor, a state prosecutor (District Attorney) and/or a federal prosecutor (US Attorney); and (3) whether it should be tried at tribal, state and/or federal level. Lastly, this determination dictates the body of law to be applied to the case: tribal, federal and/or state.

The jurisdiction of these different authorities often overlaps, resulting in confusion and uncertainty. In many areas there may be dual jurisdiction. The end result can sometimes be so confusing that no one intervenes, leaving victims without legal protection or redress and resulting in impunity for the perpetrators, especially non-Indian offenders who commit crimes on tribal land.

Tribal authority

As citizens of particular tribal nations, the welfare and safety of American Indian and Alaska Native women are directly linked to the authority and capacity of their nations to address such violence. A series of federal laws and US Supreme Court decisions over the years have increasingly restricted the authority of American Indian and Alaska Native Nations to exercise jurisdiction over crimes committed on tribal land. The undermining of tribal authority has occurred over time and in many ways. However, four laws have had a particularly significant impact¹: the Major Crimes Act, Public Law 280, and the Indian Civil Rights Act along with the case law of *Oliphant v Suquamish*.

- The **Major Crimes Act** (1885) granted the federal authorities jurisdiction over certain serious crimes committed by Indian perpetrators, including rape and murder, committed in Indian Country.² There has been a widespread misconception that under the Act only the federal authorities have the authority to prosecute major crimes.³ In fact, tribal

¹ These are not the only laws that have had a significant impact. For example, the General Crimes Act (1817) granted the federal courts jurisdiction over crimes committed in Indian country wherein one party – either the victim or the perpetrator – is an "Indian" as defined under applicable federal law while the other party is a non-Indian as defined under federal law¹. This law does not apply, however, to "an Indian defendant who has been punished by the local law of the tribe or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively".

² Act of 3 March 31, 1885, § 8, codified as amended at 18 U.S.C. § 1153.

³ Decision of the Assistant Secretary- Indian Affairs Regarding the Major Crimes Act, 18 U.S.C. §1153, April 1987 (on file with AIUSA), United States Department of the Interior regarding Washoe Tribal Council

authorities retain concurrent jurisdiction over perpetrators that are Indian. Nevertheless, the impact of the Act in practice has been that fewer major crimes have been pursued through the tribal justice systems.

- State authorities do not generally have the authority to exercise criminal jurisdiction over American Indians/Alaska Natives on tribal land. **Public Law 280** (1953), however, transferred federal criminal jurisdiction over many offences involving members of federally recognized Indian tribes on designated tribal lands to state governments in some states.⁴ The US Congress gave six states – California, Minnesota, Nebraska, Oregon, Wisconsin and Alaska upon statehood-- extensive criminal and civil jurisdiction over Indian Country. Public Law 280 also permitted additional states – currently exercised in varying degrees by Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, South Dakota, Utah and Washington -- to acquire jurisdiction if they wished, and while a number of states originally opted to do so, currently only Florida exercises full Public Law 280 jurisdiction.⁵ Where Public Law 280 is applied, both tribal and state authorities have concurrent jurisdiction over crimes committed on tribal land by American Indians or Alaska Natives. Public Law 280 is seen by many Indigenous peoples as an affront to tribal sovereignty, not least because states have the option to assume and to relinquish jurisdiction, a power not extended to the tribal governments affected. In addition, Congress failed to provide additional funds to Public Law 280 states to support the law enforcement activities they had assumed. The BIA, however, reduced funding to tribal authorities as a result of the shift in jurisdiction. This has led to a situation where tribal and state authorities have not received sufficient funds to assume their respective law enforcement responsibilities, resulting in a perception of “lawlessness” in some communities and difficult relations between tribal and state officials.⁶
- The **Indian Civil Rights Act** (1968) limited the criminal sentence which can be imposed by tribal courts for any offence – including murder or rape -- to a maximum of one year’s imprisonment and a US\$5,000 fine.⁷ No such limits exist for tribal civil jurisdiction. The message sent by this law is that, in practice, tribal justice systems are only equipped to handle less serious crimes. While this limitation on the custodial sentencing powers of tribes (and resource limitations) substantially limits the ability of tribal justice systems to hold offenders accountable, an increasing number of tribal courts are prosecuting sexual assault cases due to the inadequate rate of federal and state prosecutions of sexual assault cases.

Resolution No. 83-W-32, included in correspondence from Ross Swimmer, Assistant Secretary – Indian Affairs, April, 1987 .

⁴ Pub. L. No. 83-280, 67 Stat. 588 (1953), codified as amended at 18 U.S.C. § 1162, 28 U.S.C. § 1360, and 25 U.S.C. §§ 1321-26. Although individual states may have been excluded from the application of the statute in the first place, a number of tribes (including all tribes in New York and several in the Northeast and Texas) are subject to state criminal jurisdiction as a result of special congressional acts, outside the framework of Public Law 280. (Correspondence with Carole Goldberg, Professor of Law, UCLA, 18 December, 2006). Furthermore there are some tribes in Public Law 280 states that were excluded from application of the statute.

⁵ Correspondence with Carole Goldberg, Professor of Law, UCLA, 18 December 2006.

⁶ See, for example, Public Law 280: Issues and Concerns for Victims of Crime in Indian Country, Ada Pecos Melton and Jerry Gardner, *available at* <http://www.tribal-institute.org/articles/gardner1.htm>, visited 29 March 2006.

⁷ The Indian Civil Rights Act was included as title II of the Civil Rights Act of 1968, Pub. L. No. 96-88, 81 Stat. 787 (1968). ICRA was amended in 1986 by the Omnibus Drug Enforcement, Education, and Control Act of 1986, Pub. L. 99-570; 100 Stat. 3207 (1986), at which time sentencing limitations were increased from “a term of six months and a fine of \$500, or both” to “for a term of one year and a fine of \$5,000, or both.” ICRA is codified as amended at 25 U.S.C. §§ 1301-1303.

- In 1978, the Supreme Court ruled that tribal courts could not exercise criminal jurisdiction over non-Indian US citizens.⁸ This ruling in the case of ***Oliphant v. Suquamish*** effectively strips tribal authorities of the power to prosecute crimes committed by non-Indian perpetrators on tribal land. This situation is of particular concern given the number of reported crimes of sexual violence against American Indian women involving non-Indian men. In such situations, either federal or state authorities have the authority to intervene. Reportedly, the apparent gap in jurisdiction or enforcement has encouraged non-Indian individuals to pursue criminal activities of various kinds in Indian Country.⁹ Tribal police do have limited powers of arrest over non-Indian suspects in some states¹⁰ and they also retain the power to detain non-Indian suspects in Indian Country in order to transfer them to either federal or state authorities, but this is not generally understood by state or federal officials.

Jurisdictional Summary

The following summary is from the US Department of Justice, United States Attorneys Manual, Title 9, Criminal Resource Manual.¹¹

A. *Where jurisdiction has not been conferred on the state*

Offender	Victim	Jurisdiction
Non-Indian	Non-Indian	State jurisdiction is exclusive of federal and tribal jurisdiction.
Non-Indian	Indian	Federal jurisdiction under 18 U.S.C. § 1152 is exclusive of state and tribal jurisdiction.
Indian	Non-Indian	If listed in 18 U.S.C. § 1153, there is federal jurisdiction, exclusive of the state, but probably not of the tribe. If the listed offense is not otherwise defined and punished by federal law applicable in the special maritime and territorial jurisdiction of the United States, state law is assimilated. If not listed in 18 U.S.C. § 1153, there is federal jurisdiction, exclusive of the state, but not of the tribe, under 18 U.S.C. § 1152. If the offense is not defined and punished by a statute applicable within the special maritime and territorial jurisdiction of the United States, state law is assimilated under 18 U.S.C. § 13.

⁸ *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

⁹ "Through Indian Lands, Drugs' Shadowy Trail", *New York Times*, 19 February, 2006.

¹⁰ Depending on the particular state, tribal police may have full arrest authority over non-Indian individuals. For example, the State of Arizona recognizes tribal police and has through legislation commissioned them with State Peace Officer authority once a tribal police officer completes a State Police Academy. At the other end of the spectrum the State of California does not recognize tribal police officers at all. Throughout the USA tribal police authority to make arrests of non-Indian perpetrators often depends on the whim of a county sheriff and or other delegating authority.

¹¹ U.S. Department of Justice, "Jurisdictional Summary," U.S. Attorneys' Manual, Title 9, Criminal Resource Manual 689 Retrieved April 17, 2007

∴ http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00689.htm.

Indian	Indian	If the offense is listed in 18 U.S.C. § 1153, there is federal jurisdiction, exclusive of the state, but probably not of the tribe. If the listed offense is not otherwise defined and punished by federal law applicable in the special maritime and territorial jurisdiction of the United States, state law is assimilated. See section 1153(b). If not listed in 18 U.S.C. § 1153, tribal jurisdiction is exclusive.
Non-Indian	Victimless	State jurisdiction is exclusive, although federal jurisdiction may attach if an impact on individual Indian or tribal interest is clear.
Indian	Victimless	There may be both federal and tribal jurisdiction. Under the Indian Gaming Regulatory Act, all state gaming laws, regulatory as well as criminal, are assimilated into federal law and exclusive jurisdiction is vested in the United States.

B. *Where jurisdiction has been conferred by Public Law 280, 18 U.S.C. § 1162*

Offender	Victim	Jurisdiction
Non-Indian	Non-Indian	State jurisdiction is exclusive of federal and tribal jurisdiction.
Non-Indian	Indian	"Mandatory" state has jurisdiction exclusive of federal and tribal jurisdiction. "Option" state and federal government have jurisdiction. There is no tribal jurisdiction.
Indian	Non-Indian	"Mandatory" state has jurisdiction exclusive of federal government but not necessarily of the tribe. "Option" state has concurrent jurisdiction with the federal courts.
Indian	Indian	"Mandatory" state has jurisdiction exclusive of federal government but not necessarily of the tribe. "Option" state has concurrent jurisdiction with tribal courts for all offenses, and concurrent jurisdiction with the federal courts for those listed in 18 U.S.C. § 1153.
Non-Indian	Victimless	State jurisdiction is exclusive, although federal jurisdiction may attach in an option state if impact on individual Indian or tribal interest is clear.
Indian	Victimless	There may be concurrent state, tribal, and in an option state, federal jurisdiction. There is no state regulatory jurisdiction.

C. *Where jurisdiction has been conferred by another statute*

Offender	Victim	Jurisdiction
Non-Indian	Non-Indian	State jurisdiction is exclusive of federal and tribal jurisdiction.
Non-Indian	Indian	Unless otherwise expressly provided, there is concurrent federal and state jurisdiction exclusive of tribal jurisdiction.
Indian	Non-Indian	Unless otherwise expressly provided, state has concurrent jurisdiction with federal and tribal courts.
Indian	Indian	State has concurrent jurisdiction with tribal courts for all offenses, and concurrent jurisdiction with the federal courts for those listed in 18 U.S.C. § 1153.
Non-Indian	Victimless	State jurisdiction is exclusive, although federal jurisdiction may attach if impact on individual Indian or tribal interest is clear.
Indian	Victimless	There may be concurrent state, federal and tribal jurisdiction. There is no state regulatory jurisdiction.