

Maze of injustice

The failure to protect Indigenous women from sexual violence in the USA

End injustice – effective prosecutions

The case of a white couple charged with raping a Native American woman in August 2004 was referred to a county prosecuting attorney. At a preliminary hearing, the case was dismissed. According to the prosecuting office, the survivor did not appear for the court hearing. However the survivor told Amnesty International (AI) that she was at the court waiting in the corridor. When the judge asked whether the prosecutor wanted a continuance (adjournment) because the victim was not present, the prosecutor declined and the case was dismissed. Attempts by tribal support workers to have the case reinstated have been denied by the District Attorney. The survivor told AI: "All I want is justice."

According to the US Department of Justice, Native American and Alaska Native women are 2.5 times more likely to be raped or sexually assaulted than women in the USA in general. The reasons why Indigenous women are at particular risk of sexual violence are varied and complex.

Sexual violence against Indigenous women today is informed and conditioned by a legacy of widespread and egregious human rights abuses. It is compounded by the federal government's steady erosion of tribal government authority and its chronic under-resourcing of law enforcement agencies and service providers which should protect Indigenous women from sexual violence.

A key contributory factor identified in AI's research for the continuing high levels of violence is that all too often those responsible are able to get away with it.

"To a sexual predator, the failure to prosecute sex crimes against American Indian women is an invitation to prey with impunity."

Dr David Lisak, Associate Professor of Psychology, University of Massachusetts, 29 September 2003

Sexual violence against Native American or Alaska Native women can be prosecuted by tribal, federal or state authorities, or a combination of these. The US federal government has created a complex interrelation between these three jurisdictions that often allows perpetrators to evade justice (see [Jurisdiction](#)).

Survivors of sexual abuse, activists, support workers and officials told AI that prosecutions for crimes of sexual violence against Indigenous women are rare in federal, state and tribal courts. For example, a health official responsible for carrying out sexual assault forensic examinations reported that in about 90 per cent of cases, she is not contacted again by



police or prosecutors about examinations she has performed, although she is available as an expert witness for trials.

“Women don’t report because it doesn’t make a difference. Why report when you are just going to be revictimized?”

Pauline Musgrove, Director of the Spirits of Hope coalition, October 2005

The perpetrator of sexual violence is the person liable under criminal law for this act and should be brought to justice. However, the state also bears a responsibility if it fails to prevent or investigate and address the crime appropriately. The US authorities are failing to exercise due diligence when it comes to sexual violence against Native American and Alaska Native women.

“In Oklahoma, prosecution of sexual assault is last, least and left behind.”

Jennifer McLaughlin, Sexual Assault Specialist, Oklahoma Coalition Against Domestic Violence and Sexual Assault, September 2005

“States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women . . . enjoy the full protection and guarantees against all forms of violence and discrimination.”

(Article 22(2) of the UN Declaration on the Rights of Indigenous Peoples)

Tribal courts

Tribal courts vary greatly both in the statutes and criminal codes which they enforce and their procedures. A

common factor, however, is that they face a number of limitations imposed at federal level that interfere with their ability to provide justice for Native American and Alaska Native survivors of sexual violence (see [Jurisdiction](#) below). Inadequate funding by the federal authorities affects many aspects of the functioning of tribal courts, including the ability to proceed with prosecutions promptly. Nevertheless, prosecutions for sexual violence do occur in tribal courts and some courts are able to overcome limitations on the sentences they can hand down by imposing consecutive sentences for several offences. Some tribal courts also work with sanctions other than imprisonment, including restitution, community service and probation.

Tribal prosecutors sometimes decline to prosecute crimes of sexual violence because they expect that federal prosecutors will do so. Although some tribal prosecutors may choose to take up a case if it is declined for federal prosecution, as often happens, this can result in delays of up to a year and sometimes even longer. Often the net result is that perpetrators are not prosecuted at either level.

Federal courts

There is a failure at federal level to pursue cases of sexual violence against Indigenous women. The extent to which cases involving American Indian women are dropped before they even reach a federal court is difficult to quantify as the US Attorney’s Office does not compile such statistics. However, the evidence gathered by AI suggests that in a considerable number of instances the authorities decide not to prosecute reported cases of sexual violence against Native women.

Federal prosecutors have broad discretion in deciding which cases to prosecute, and decisions not to prosecute are rarely reviewed. AI is concerned that the difficulties involved in prosecuting rape cases, combined with the particular jurisdictional and practical challenges of pursuing cases where the crime took place on tribal land, can deter federal



Jurisdiction

Three justice systems – tribal, state and federal – are potentially involved in responding to sexual violence against Indigenous women. Three main factors determine which of these justice systems has authority to prosecute such crimes:

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

The answers to these questions are often not self-evident and there can be significant delays while police, lawyers and courts establish who has jurisdiction over a particular crime. The confusion which surrounds jurisdiction often causes delays in prosecuting reported crimes. Sometimes it means that those responsible for sexual violence against Indigenous women escape justice altogether.

“When an emergency call comes in, the sheriff will say ‘but this is Indian land.’ Tribal police will show up and say the reverse. Then, they just bicker and don’t do the job. Many times, this is what occurs. And it doesn’t always get resolved, which means no rape [sexual assault evidence] kit, etc.”

Juskwa Burnett, support worker for Native American survivors of sexual violence, May 2005

Tribal authority has been undermined over time and in many ways. Four federal laws and US Supreme Court rulings in particular have limited the ability of tribal authorities to address crimes of sexual violence against Indigenous women: the Major Crimes Act, Public Law 280, the Indian Civil Rights Act and a Supreme Court ruling (*Oliphant v Suquamish*). The last two are central to the issue of criminal jurisdiction.

- ▶ The 1968 Indian Civil Rights Act limits the penalty tribal courts can impose for any one offence – including rape or murder – to one year’s imprisonment and a US\$5,000 fine.
- ▶ The 1978 Supreme Court ruling (*Oliphant v Suquamish*) effectively stripped tribal authorities of the power to prosecute non-Indian perpetrators for crimes committed on tribal land. This ruling, which means that Indian and non-Indian perpetrators will receive different treatment for the same offence committed in the same place, is discriminatory. It also has the effect in many cases of depriving victims of access to justice.

“[N]on-Native perpetrators often seek out a reservation place because they know they can inflict violence without much happening to them.”

Andrea Smith, University of Michigan, Assistant Professor of Native Studies, quoted by Jodi Rave, “South Dakota Tribal-City Police Department a National Model for Handling Domestic Abuse”, *The Missoulian*, 24 September 2006.

Federally recognized Indian tribes are sovereign under US law. They have jurisdiction over their citizens and land and maintain government to government relationships with each other and with the US federal government. The US federal government has a legal responsibility (known as the federal trust responsibility) to ensure protection of the rights and wellbeing of American Indian and Alaska Native peoples.

prosecutors from taking the case. When federal prosecutors decline to prosecute cases involving non-Native perpetrators, there is no further recourse for Indigenous survivors under criminal law within the USA.

In addition, Indigenous survivors of sexual violence often face prejudice and discrimination at all stages and levels of federal and state prosecution. This can influence decisions about whether to prosecute cases, how prosecutors present survivors during trials, how juries are selected and how they formulate their decisions.

State courts

In some states, such as Alaska, state rather than federal prosecutors have jurisdiction. However, the same pattern of failing to pursue cases of sexual violence against Indigenous women emerged. Health workers in Alaska told AI that there is no prosecution in approximately 90 per cent of cases where

Indigenous women undergo a sexual assault forensic examination in Anchorage.

Communicating with survivors

Amnesty International received a number of reports that prosecutors at all levels fail to provide information consistently to Indigenous victims of sexual violence about the progress of their cases. Survivors are frequently not informed whether their cases will proceed to trial or not.

“One [Native American] woman I work with told me that she reported her sexual assault two years ago and that she didn’t know if the case had been investigated or prosecuted. I researched the case and discovered it had been declined [for prosecution], but no one had told the woman.”

Support worker for Native American survivors of sexual violence (identity withheld), January 2006

Key recommendation

Prosecutors should vigorously prosecute cases of sexual violence against Indigenous women, and should be sufficiently resourced to ensure that the cases are treated with the appropriate priority and processed without undue delay. Any decision not to proceed with a case, together with the rationale for the decision, should be promptly communicated to the survivor of sexual violence and any other prosecutor with jurisdiction.

For more information see Amnesty International’s report, *Maze of injustice: the failure to protect Indigenous women from sexual violence in the USA* (AI Index: AMR 51/035/2007). The report is based on detailed research carried out by Amnesty International USA (AIUSA) in 2005 and 2006, with particular focus on three locations: the Standing Rock Sioux Reservation in North and South Dakota and the states of Oklahoma and Alaska. Amnesty International is indebted to all the survivors of sexual violence who courageously came forward to share their stories and to Native American and Alaska Native organizations, experts and individuals who provided advice and guidance.

