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VIOLENCE AGAINST THE EARTH BEGETS VIOLENCE AGAINST WOMEN:¹

AN ANALYSIS OF THE CORRELATION BETWEEN LARGE
EXTRACTION PROJECTS AND MISSING AND MURDERED
INDIGENOUS WOMEN, AND THE LAWS THAT PERMIT THE
PHENOMENON THROUGH AN INTERNATIONAL HUMAN RIGHTS
LENS

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This note examines the prevalence of sex trafficking of Native women and children, and the correlation those rates have with large extraction projects, such as the Bakken Oil Fields in North Dakota, and the camps (“man camps”) that employees live in. In order to fully flesh out the phenomenon accurately, this note walks through pertinent history and the Truth of the Native experience of colonization and genocide in the United States. Further, this note also examines the current laws and policies in the United States that perpetuate and exacerbate the Missing and Murdered Indigenous Women and Girls phenomenon. Finally, it compares those laws and policies to international human rights standards, speaks to how the United States consistently falls short of international human rights standards, and how the issue can be remedied.

¹ This phrase is original to Melina Laboucan-Massimo (Lubicon Cree First Nation).

² (Cherokee & Blackfeet) J.D. Candidate, James E. Rogers College of Law, University of Arizona. This issue is near and dear to me, as it is to all of us that have connections to Indian Country. I would like to thank the Indigenous Peoples Law and Policy faculty and staff for their unwavering support in all things. Thank you to the International Indian Treaty Council for welcoming me as an intern and allowing me to continue my research and work on the Missing and Murdered Indigenous Women and Girls phenomenon. Thank you to the Philosophy and Religious Studies Department at Central Washington University for teaching me crucial writing skills and assisting in the formation of my writing style. Thank you to my family and partner, without you, none of this would be possible.

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In writing this piece, I hope that acknowledgment and education regarding Missing and Murdered Indigenous Women and Girls proliferates. We are still here. We matter.

I. Introduction

Human trafficking⁵ is an epidemic in the United States, with an estimated more than 400,000 people living in modern-day slavery.⁶ However, this number does not correctly capture the rates at which Native women and children are trafficked because those statistics are not adequately recorded, if at all.⁷

³ Many of the names gathered on this list are the result of research on Missing and Murdered Indigenous Women and Girls conducted by the Urban Indian Health Institute. URBAN INDIAN HEALTH INSTITUTE, MISSING AND MURDERED INDIGENOUS WOMEN & GIRLS 24-28 (2018), <https://www.uihi.org/wp-content/uploads/2018/11/Missing-and-Murdered-Indigenous-Women-and-Girls-Report.pdf>.

⁴ Lissa Yellowbird-Chase, member of the Mandan, Hidatsa, and Arikara Nation, works diligently to help find Murdered and Missing Indigenous Women and Girls when officials have failed to do so. Sophia Myszkowski, *On the Trail of Missing American Indian Women*, THE ATLANTIC (Oct. 10, 2018), <https://www.theatlantic.com/health/archive/2018/10/trail-missing-american-indian-women/571657/>.

⁵ This note discusses sex trafficking almost exclusively in tandem with the Missing and Murdered Indigenous Women and Girls phenomenon. Although, I acknowledge that this type of trafficking is not the only kind that plagues Indigenous Peoples in the U.S.

⁶ *Country Data: United States, 2018 GSI*, GLOBAL SLAVER INDEX, <https://www.globallslaveryindex.org/2018/data/country-data/united-states/> (last visited March 14, 2019).

⁷ *Inadequate Data on Missing, Murdered Indigenous Women and Girls*, NATIONAL INDIAN COUNCIL ON AGING (Jan. 21, 2019), <https://nicoa.org/inadequate-data-on-missing-murdered-indigenous-women-and-girls/>. Additionally, a recent study by Urban Indian Health Institute

Additionally, the rates at which Native women and children are trafficked increase exponentially when Indigenous communities are near large extraction projects that require the use of camps to provide living accommodations for employees.⁸

There are many factors that account for the disparate impact Indigenous communities and Native women and children experience regarding trafficking. Those factors cannot be fully fleshed out without acknowledging the damage that has been and continues to be done to Indigenous communities through colonization and blatant acts of genocide⁹. Remnants of a time that believed the salvation of Indigenous communities began with “kill[ing] the Indian, and sav[ing] the man”¹⁰ in tandem with an extreme othering¹¹ that lessened a perceived humanity of Native Peoples. The influence of those laws, policies, and

showed that only “116 of the 5,712 cases of murdered or missing Native women were logged into the Department of Justice’s nationwide database.” Additionally, “no research ha[s] been done on rates of violence among American Indian and Alaska Native women living in urban areas, even though 71 percent of them live there.” *Id.* According to current data, Native women and children make up roughly 40% of all trafficked victims in the U.S. and Canada but only represent 10% or less of the population. There are also concerns of labor trafficking and trafficking of Native babies for adoption. *Adoptive Couple v. Baby Girl*, 570 U.S. 637 (2013) is a point of contention in the community. Liza Kane-Hartnett, *Trafficking in Tribal Nations: the Impact of Sex Trafficking on Native Americans*, HUMAN TRAFFICKING SEARCH (Jan. 22, 2018), <http://humantraffickingsearch.org/traffickingofnativeamericans/>.

⁸ Kane-Hartnett, *supra* note 7.

⁹ Genocide is defined as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; [and] forcibly transferring children of the group to another group.” Office of the UN Special Advisor on the Prevention of Genocide (OSAPG), *Analysis Framework*, https://www.un.org/ar/preventgenocide/adviser/pdf/osapg_analysis_framework.pdf (last visited Nov. 12, 2019). Genocide has been and continues to be a fact for Native Americans and Indigenous Peoples.

¹⁰ A phrase coined by Capt. Richard H. Pratt from a speech he gave in 1892. “Ideas expressed in Pratt’s speech are central to the development of the Carlisle Indian School (founded 1879) and other boarding schools across the country, which aimed to ‘civilize’ and ‘Americanize’ the Indian.” “*Kill the Indian, and Save the Man*”; *Capt. Richard H. Pratt on the Education of Native Americans*, CARLISLE INDIAN SCHOOL DIGITAL RESOURCE CENTER, <http://carlisleindian.dickinson.edu/teach/kill-indian-and-save-man-capt-richard-h-pratt-education-native-americans> (last visited March 22, 2019). Sixty-four boarding schools remain open today. *Resources*, THE NATIONAL NATIVE AMERICAN BOARDING SCHOOL HEALING COALITION, <https://boardingschoolhealing.org/education/resources/> (last visited April 2, 2019). However, the Indian Child Welfare Act of 1978 sought to protect Native Peoples from separation of their children at exponential rates. Indian Child Welfare Act of 1978, 25 U.S.C.A. §1902 (2012).

¹¹ Othering is a term generally attributed to Edmund Husserl, the founder of phenomenology. Othering is to be defined as “treating people from another group as essentially different from and generally inferior to the group you belong to.” *Othering*, MACMILLAN DICTIONARY, <https://www.macmillandictionary.com/us/dictionary/american/othering> (last visited March 28, 2019).

attitudes continue to directly impact Indigenous communities today. As a result, the United States falls short of adhering to international human rights standards.

This note is separated into four sections. Section one includes a synopsis of the pertinent background and definitions. Section two includes case studies and examples. Section three includes the U.S. law that contributes to the Missing and Murdered Indigenous Women and Girls phenomenon and pertinent human rights law and standards. Section four includes recommendations and conclusions regarding the Missing and Murdered Indigenous Women and Girls phenomenon.

II. Background

A. Violence Against the Earth

This note concentrates primarily on the oil and gas projects that have extreme ramifications on the environment in which they are built. Pipelines that carry gas and oil are hazardous, not only to the environment, but also to those that inhabit the areas surrounding them. Pipelines are generally made of steel or plastic, can be more than 40 inches in diameter, are generally buried underground, and can cross under rivers.¹² Currently, there are roughly “2.7 million miles of oil, gas, and other hazardous liquids pipelines across the United States.”¹³

Additionally, pipelines are only designed to last roughly 50 years with routine maintenance, and nearly half of all pipelines that exist now were built between the 50s and 70s.¹⁴ As a result, many pipelines are entering the end of their design life.¹⁵ Between the years 1986 and 2013, “there were nearly 8,000 ‘significant’ pipeline spill, fire, and explosion incidents.”¹⁶ Those incidents caused “more than 500 deaths, 2,300 injuries, and nearly \$7 billion in damage.”¹⁷ However, it is not only the older pipelines that are failing. Newer pipelines are failing at similar rates because pipelines are not being monitored and inspected as needed.¹⁸

Newer pipelines are not being inspected as they should because there are only roughly 530 state and federal pipeline inspectors nationwide.¹⁹ A compounding factor is that only “about 50% of oil and liquids pipelines and 10% of gas pipelines are subject to federal management guidelines for inspections and repairs.”²⁰ Consequently, many operating companies create and follow their own standards.²¹

¹² *Pipelines*, EARTHWORKS, <https://earthworks.org/issues/pipelines1/> (last visited April 5, 2019).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

Environmental damage is widespread and often far worse than foreseen. Pipelines can pollute the air, water, soil, and the entire climate when they leak.²² Additionally, pipelines that run under bodies of water are more susceptible to breaks and leaks due to the weight after heavy rain and floods.²³ As a result, pipelines that run under or near water are even more dangerous for the environment and those that depend on those bodies of water. As a side note, the Marcellus Shale region will lose roughly 60,000-150,000 acres of forest due to clear-cutting for pipeline development.²⁴

Pipelines, fracking, and other large extraction projects similar in nature can, and often do, destroy the environment in unforeseen ways and in some instances, in irreparable ways. Those that live in these areas become collateral damage.

B. Colonization, Genocide, and Today

The history Native Peoples have experienced with colonization is a significant factor that must be discussed when issues such as trafficking arise within the community. First, colonization²⁵ of North America began in the late 1400s to mid-1500s with the Spaniards claiming the region and the French building a colony in Florida.²⁶ Children of the United States are taught many things regarding colonization in elementary, middle, and even high schools regarding the matter;²⁷ however, they are not taught that the process of colonization has and continues to result in genocide of Indigenous Peoples. As a result, colonization for Indigenous Peoples has been and continues to be a nightmare for which there is no escape, and there is no waking.

Prior to colonization, an estimated over 10 million Native Americans lived within what is now the U.S.²⁸ Around 1900, roughly less than 300,000 Native Americans were living within what is now the U.S.²⁹ Disease played a large role in the decline of the Native population; however, many believe that illness was

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ Colonization is defined as “the action or process of settling among and establishing control over the indigenous people of an area.” *Dictionary: Colonization*, LEXICO, <https://en.oxforddictionaries.com/definition/colonization> (last visited Jan. 10, 2019).

²⁶ *Colonial Settlement, 1600s-1763*, LIBRARY OF CONGRESS, <http://www.loc.gov/teachers/classroommaterials/presentationsandactivities/presentations/timeline/colonial/> (last visited March 2, 2019).

²⁷ Examples include: the first Thanksgiving – pilgrims and the Indians being friends and sharing meals with one another; Pocahontas (the animated Disney films); the Indians helping and ‘making room’ for the settlers by voluntarily leaving, etc.

²⁸ *Atrocities Against Native Americans*, UNITED TO END GENOCIDE, <http://endgenocide.org/learn/past-genocides/native-americans/> (last visited Nov. 25, 2018).

²⁹ *Id.*

part of being introduced to new people and animals. That is not the case. There are documented instances of purposeful dispersion of ‘smallpox blankets.’³⁰ An example of such occurrences is when Sir Jeffrey Amherst, commander-in-chief of British forces in North America, wrote to Colonel Henry Bouquet at Fort Pitt: ‘You will do well to try to inoculate the Indians [with smallpox] by means of blankets, as well as to try every other method, that can serve to extirpate this execrable race.’³¹

Settlers knew that the blankets that previously belonged to smallpox patients were contagious and gave them to Natives purposefully. Additionally, as more settlers came to the ‘new frontier,’ “ranging”³² became routine practice in the late 1600s.³³ Initially, fulfilling bounties for murdered Natives was done by severing their heads and “cashing them in” to colonial officials during the Pequot War.³⁴ Later, scalps became the proof to fulfill the bounties because they were “more portable in large numbers.”³⁵ By the mid-1670s, hunting for scalps was a routine practice.³⁶ Settler authorities encouraged settlers to “take off on their own or with a few others to gather scalps, at random, for the reward money.”³⁷ “Moreover, ‘in the process . . . they established the large-scale privatization of war within American frontier communities.’”³⁸ The term ‘redskins’ was coined to refer to “mutilated and bloody corpses . . . left in the wake of scalp hunts”³⁹ and the scalps themselves.⁴⁰ Settlers hunted⁴¹ Natives to establish dominance, gain land, make money, and ultimately, to eliminate Natives from the “new frontier.”

³⁰ *Id.*

³¹ *Id.*

³² Ranging is a term for scalp hunting coined by John Grenier, a military historian. Roxanne Dunbar-Ortiz, *What “Redskins” Really Means: An Origin of Violence and Genocide*, BEACON BROADSIDE: A PROJECT OF BEACON PRESS (Sept. 17, 2014), <https://www.beaconbroadside.com/broadside/2014/09/what-redskins-really-means.html>.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Baxter Holmes, *Update: Yes, A ‘Redskin’ Does, In Fact, Mean the Scalped Head of a Native American, Sold, Like a Pelt, for Cash*, ESQUIRE (Jun. 18, 2014), <https://www.esquire.com/news-politics/news/a29318/redskin-name-update/>. An excerpt from 1863 in *The Daily Republican* newspaper reads: “The State reward for dead Indians has been increased to \$200 for every redskin sent to Purgatory. This sum is more than the dead bodies of all the Indians east of the Red River are worth.” *Id.*

⁴¹ People still go onto reservations to ‘hunt’ due to jurisdictional issues and lack of resources on behalf of Tribal police and governments. Garett Bleir and Anya Zoledziowski, *The missing and murdered: ‘We as Native women are hunted,’* INDIANZ (Aug. 27, 2018), <https://www.indianz.com/News/2018/08/27/the-missing-and-murdered-we-as-native-wo.asp>.

Hunting never ended;⁴² it only evolved. The Indian Boarding School Policy began in 1869 as a result of the Indian Civilization Act Fund,⁴³ the Peace Policy of 1869,⁴⁴ and the “urging of several denominations of the Christian Church.”⁴⁵ Boarding schools were “expressly intended to implement cultural genocide through the removal and reprogramming of American Indian and Alaska Native children to accomplish the systematic destruction of Native cultures and communities.”⁴⁶ General Richard Henry Pratt spearheaded boarding schools and opened the most notorious one of all: the Carlisle Indian Industrial School.⁴⁷ His only goal in mind was to “kill the Indian..., and save the man.”⁴⁸

Atrocities at the boarding schools ensued. By 1926, “nearly 83% of Indian school-age children were attending boarding schools.”⁴⁹ At these boarding

⁴² John Ahni Schertow, *Colonialism, Genocide, and Gender Violence: Indigenous Women*, INTERCONTINENTAL CRY (Dec. 15, 2006), <https://intercontinentalcry.org/colonialism-genocide-and-gender-violence-indigenous-women/>. This article is an invaluable resource for those attempting to grasp the experience that is colonization and genocide. The article presents memories and accounts of the atrocities Indigenous Peoples have faced in North America since contact. Some of those accounts include: mutilating Creek Indian corpses to attain flesh to tan and “turn into bridle reins,” the fact that “California spent over one million dollars hiring soldiers to exterminate Natives” in 1851 and 1852, and other accounts speak to torture and rape of epic proportions and speak to cutting away genital organs to “stretch[] them over ... saddle-bows and ... over [] hats.” *Id.*

⁴³ Civilization Fund Act, ch. 85, 3 Stat. 516 (1819). The Civilization Fund Act of 1819 authorized the President to “employ capable person of good moral character, to instruct them [Indians] in the mode of agriculture suited to their situation; and for teaching their children in reading, writing, and arithmetic.” *Id.*

⁴⁴ The Peace Policy of 1868 was to “remove corrupt Indian agents; who supervise reservations, and replace them with Christian missionaries” whom President Grant “deem[ed] morally superior.” *1868: President Grant advances “Peace Policy” with tribes*, NATIONAL LIBRARY OF MEDICINE, <https://www.nlm.nih.gov/nativevoices/timeline/342.html> (last visited Jan. 27, 2019). Further, the “reality [of] the [] policy rested on the belief that American had the right to dispossess Native [P]eoples of their lands, take away freedoms, and send them to reservations, where missionaries would teach them how to farm, read and write, wear Euro-American clothing, and embrace Christianity. If Indians refused to move to reservations, they would be forced off their homelands by soldiers.” *Id.* (citing Clifford Trafzer, *AMERICAN INDIANS/AMERICAN PRESIDENTS: A HISTORY* (1st ed. 2009)).

⁴⁵ *U.S. Indian Boarding School History*, THE NATIONAL NATIVE AMERICAN BOARDING SCHOOL HEALING COALITION, <https://boardingschoolhealing.org/education/us-indian-boarding-school-history/> (last visited Feb. 6, 2019).

⁴⁶ *Id.*

⁴⁷ THE CARLISLE INDIAN SCHOOL PROJECT, <http://www.carlisleindianschoolproject.com/history/> (last visited Feb. 2, 2019).

⁴⁸ *U.S. Indian Boarding School History*, *supra* note 45. The excerpt of the speech reads: “A great general has said that the only good Indian is a dead one, and that high sanction of his destruction has been an enormous factor in promoting Indian massacres. In a sense, I agree with the sentiment, but only in this: that all the Indian there is in the race should be dead. Kill the Indian in him, and save the man.” *Id.*

⁴⁹ *Id.*

schools, Native children were “punished for speaking their native language, banned from acting in any way that might be seen to represent traditional or cultural practices, stripped of traditional clothing, hair and personal belongings and behaviors reflective of their native culture.”⁵⁰ Abuse and even torture were rampant.⁵¹ Irene Mack Pyawasit recalls her experience at the Menominee Reservation boarding school:

The government employees that they put into the schools had families but still there were an awful lot of Indian girls turning up pregnant. Because the employees were having a lot of fun, and they would force a girl into a situation, and the girl wouldn't always be believed. Then, because she came up pregnant, she would be sent home in disgrace. Some boy would be blamed for it, never the government employee. He was always scot-free. And no matter what the girl said, she was never believed.⁵²

Many children never made it home, and there is no account as to why.⁵³

Soon after, Native children began being stolen from their homes and families. In the late 1800s, the Allotment Era created reservations to segregate Natives from settlers, but it primarily provided a “laboratory for teaching Indians the virtues of agriculture and civilization.”⁵⁴ The separation and experimentation that ensued was a result of the General Allotment Act of 1887.⁵⁵ The Act allows for the U.S. Government to separate segments of reservations and “allot the land in said reservation in severalty to any Indian located thereon.”⁵⁶ The sole purpose of the Act was to assimilate Natives and eventually abolish reservations.⁵⁷

Termination and relocation occurred in the mid-1900s.⁵⁸ Congress's goal was to sell the land inhabited by Natives and relocate them to urban areas to promote assimilation.⁵⁹ This tactic was used as a weapon: “Nothing else that Congress can do causes [T]ribal members to lose more of their rights than termination. Termination is the ultimate weapon of Congress and ultimate fear of

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² John Ahni Schertow, *Colonialism, Genocide, and Gender Violence: Indigenous Women*, INTERCONTINENTAL CRY (Dec. 15, 2006), <https://intercontinentalcry.org/colonialism-genocide-and-gender-violence-indigenous-women/>.

⁵³ *Id.*

⁵⁴ Judith Royster, *The Legacy of Allotment*, 27 ARIZ. ST. L.J. 1, 8 (1995).

⁵⁵ Indian General Allotment Act of 1887, 25 U.S.C.A. §§ 331-334, 336, 339, 341, 342, 348, 349, 381 (West 2000).

⁵⁶ The Dawes Act of 1887, Pub. L. No. 49-105, 24 Stat. 388 (codified as amended at 25 U.S.C. ch. 9 §§ 331-358).

⁵⁷ Judith Royster, *The Legacy of Allotment*, 27 Ariz. St. L.J. 1, 9 (1995), https://digitalcommons.law.utulsa.edu/cgi/viewcontent.cgi?article=1034&context=fac_pub.

⁵⁸ *Native Peoples' Concepts of Health and Illness*, NATIONAL LIBRARY OF MEDICINE, <https://www.nlm.nih.gov/nativevoices/timeline/488.html> (last visited Jan. 27, 2019).

⁵⁹ *Id.*

[T]ribes.”⁶⁰ In 1975, the Indian Self-Determination and Education Assistance Act was passed.⁶¹ Even so, the Indian Child Welfare Act was not passed until 1978.⁶²

Although Congress seemed to be stepping in the right direction, Native children continued to be forcibly removed from their homes.⁶³ That trend continues today. Currently, Native children are placed in foster care at a “rate 2.7 times greater than their proportion in the general population.”⁶⁴ As a result, there is a lack of Native families available to foster children; therefore, non-Native families are fostering and adopting Native children exponentially.⁶⁵

The history of Natives and the genocide that has and continues to occur is exemplified through the persistent othering in today’s culture. Native mascots that are meant to “honor” Native heritage are blatantly racist.⁶⁶ However, when Natives express that these mascots are disrespectful, they are publicly ridiculed for “all of a sudden having a problem and partaking in the political correctness movement.”

Additionally, Natives are still widely used as a popular Halloween costume. Non-Natives dress in “traditional” Native clothing and stolen regalia to be “sexy” and further fetishize a people that are still here. In doing so, every single person that partakes contributes to the further othering of Natives and promotes stereotypes and myths that are incredibly damaging. Those stereotypes and myths proliferate through law, policy, and general perception, and they directly contribute to the Missing and Murdered Indigenous Women and Girls phenomenon. It is easy to rape and murder those that are lesser.

C. Trafficking Generally

Trafficking is defined as “the recruitment, harboring, transportation, provision, or obtaining of a person or services, through the use of force, fraud or coercion for the purposes of subjection to involuntary servitude, peonage, debt bondage or slavery.”⁶⁷

⁶⁰ *Id.*

⁶¹ *Indian Resources Timeline*, DEPARTMENT OF JUSTICE, <https://www.justice.gov/enrd/timeline/indian-resources-timeline> (last visited Mar. 3, 2019).

⁶² *About ICWA*, NATIONAL INDIAN CHILD WELFARE ASSOCIATION, <https://www.nicwa.org/about-icwa/> (last visited Feb. 9, 2019).

⁶³ *Id.*

⁶⁴ Debra Utacia Krol, *Inside the Native American Foster Care Crisis Tearing Families Apart*, VICE (Feb. 7, 2018), https://www.vice.com/en_us/article/a34g8j/inside-the-native-american-foster-care-crisis-tearing-families-apart.

⁶⁵ *Id.*

⁶⁶ *See generally*, EDOUARDO ZENDEJAS, MASCOTS THAT HONOR INDIANS: THE AUDACITY OF A DOPE FOR SUGGESTING SCHOOLS CHANGE THEIR INDIAN MASCOTS (2009).

⁶⁷ Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7102(9)(B) (2019).

Three elements must be apparent to show that trafficking has occurred: action, means, and purpose.⁶⁸ Occurrences that show action are, “recruiting, harboring, transporting, providing, or obtaining of an individual,” and “patronizing, soliciting, and advertising an individual.”⁶⁹ Means includes “force, fraud, or coercion.”⁷⁰ Force is generally easier to show due to the apparent signs of such action, but fraud and coercion are significantly harder to show.⁷¹ The latter includes “false promises of work/living conditions, withholding promised wages, or contract fraud,” and “threats of harm to self or others, debt bondage, psychological manipulation, or document confiscation,”⁷² with a purpose that is either for “compelled labor or services or commercial sex act(s).”⁷³ However, not all of these elements have to be demonstrated when victims are under the age of 18.⁷⁴

Human traffickers partake in the industry due to a cost-benefit analysis that places them at a low risk of detection and potential prosecution.⁷⁵ Factors that contribute to the low cost of trafficking include: “lack of government and law enforcement training, low community awareness, ineffective or unused laws, lack of law enforcement investigation, scarce resources for victims’ recovery services, and social blaming of victims.”⁷⁶ Even so, the largest factor contributing to the low-cost analysis are the extremely high profits gained from individuals willing to contribute to these industries.⁷⁷

D. Man Camps

“Man camps” are temporary housing provided to employees of large extraction projects.⁷⁸ The term “man camp” is popular and most fitting because men are employed, and their housing closely resembles camps. Due to the temporary nature of the structures, the camps are often left abandoned once the work is complete.

Man camps are situated near the extraction projects that employ them. This is important because many men are away from their families and loved ones with free time, large amounts of money, and little entertainment to fill that free

⁶⁸ *Human Trafficking*, NATIONAL HUMAN TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/type-trafficking/human-trafficking> (last visited Feb. 12, 2019).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Man Camps Fact Sheet*, HONOR THE EARTH, http://www.honorearth.org/man_camps_fact_sheet (last visited Jan. 15, 2019).

time.⁷⁹ As a result, these men commit crime and prey upon local Indigenous communities.⁸⁰ For example, in 2012, Tribal police on the Fort Berthold Reservation “reported more murders, fatal accidents, sexual assaults, domestic disputes, drug busts, gun threats, and human trafficking cases than any year before” as a direct result of an “influx of non-Indian oil workers.”⁸¹

Complex jurisdictional issues between federal, state, and Tribal governments exacerbate the problem of man camps. Additionally, Tribal police departments are often underfunded and lack resources to combat increased crime stemming from the man camps even when it is clear that they have the authority to pursue the perpetrators.⁸² Unfortunately, the residents of the man camps are well aware of the situation. An anonymous man that was interviewed about the issues regarding extraction projects, man camps, and trafficking of Native women and children said, “You can do anything short of killing somebody.”⁸³ Many men refer to Indian reservations as “the Wild West.”⁸⁴ Those sentiments, along with the pervasive jurisdictional issues, promote the horrible treatment of Native women, children, and Indigenous communities.

E. Trafficking in the Context of Natives

Statistics regarding the rates at which Native women and children are trafficked are lacking at best. Records are either poorly kept or not kept at all.⁸⁵ Furthermore, there are issues with general population statistics because they are not desegregated⁸⁶ and because of the inaccurate reliance on the appearance of

⁷⁹ James William Gibson, *Crime Accompanies Flow of Oil Workers into North Dakota*, EARTH ISLAND JOURNAL (Dec. 12, 2012), http://www.earthisland.org/journal/index.php/articles/entry/crime_accompanies_flow_of_oil_workers_into_north_dakota/.

⁸⁰ *Id.*

⁸¹ *Man Camps Fact Sheet*, *supra* note 78.

⁸² COALITION TO STOP VIOLENCE AGAINST NATIVE WOMEN, <https://www.csvanw.org/mmiw/> (last visited Dec. 30, 2018).

⁸³ Sierra Crane-Murdoch, *On Indian Land, Criminals Can Get Away With Almost Anything*, THE ATLANTIC (Feb. 22, 2013), <https://www.theatlantic.com/national/archive/2013/02/on-indian-land-criminals-can-get-away-with-almost-anything/273391/>.

⁸⁴ U.N. PFII, 14th Sess, Honor the Earth: Dr. Dawn Memee Harvard, *Extreme Extraction and Sexual Violence Against Indigenous Women in the Great Plains*, (Apr. 21, 2015), <https://papersmart.unmeetings.org/media2/4658047/native-womens-association-of-canada-2.pdf>.

⁸⁵ Nick Pachelli, *Why was a study on trafficking in Indian Country canceled?*, HIGH COUNTRY NEWS (Jan. 23, 2019), <https://www.hcn.org/articles/tribal-affairs-how-trafficking-in-native-communities-has-been-ignored-under-the-trump-administration>. Additionally, there was a study commissioned by the National Institute of Justice, but was “killed” just a year later after the Trump administration took office. *Id.*

⁸⁶ Office of Policy Analysis, *2016 American Indian and Alaska Native Data Workshop Summary Report*, U.S. DEPT. OF THE INTERIOR 1, 2-3 (2016), https://www.doi.gov/sites/doi.gov/files/uploads/indian_data_workshop_summary_report_-_final_draft_3_20_2017.pdf.

indigeneity.⁸⁷ When statistics are kept, no data is collected as to whether victims are Native American.⁸⁸ However, the available statistics show that Native women are 2.5 times more likely to be raped than any other population.⁸⁹ Additionally, “96 percent of reported cases are perpetrated by non-Natives.”⁹⁰ Native women are victimized at much higher rates than other populations, and the rates at which the perpetrator is non-Native is telling. It shows that those acts of blatant colonialism and genocide are still prevalent today.

Unfortunately, tools and methods are available to collect data regarding trafficking and Native women, but those that have the ability to do so “balked at being required to provide data on American Indians.”⁹¹ Consequently, it is challenging to justify awarded grants and difficult to track whether those grants are actually helping the population intended.⁹² Even so, Tribes are reporting that “prostitution and human trafficking on reservations and Native-owned business” are increasing, but they do not provide numbers, so the incremental increase is unknown.⁹³ Without data, Missing and Murdered Indigenous Women and Girls will continually be thrown to the wayside.

III. Case Studies

This note includes a several small case studies to show the prevalence of sex trafficking of Native women and children, especially in relation to large extraction projects. Doing so also gives a voice to those that are missing and brings awareness to the issues directly. Additionally, the absence of data calls for, at least in part, anecdotal evidence because the experiences that have been expressed are the only account in many cases of what is actually occurring in Indian Country⁹⁴ and Native communities. Unfortunately, there is a copious

⁸⁷ Even when data is collected and segregated, there are still issues because not all Natives ‘appear’ Native. Stereotypes play a large role in mis-identifying Natives. *Id.*

⁸⁸ Suzette Brewer, *Sold for Sex: Senate Committee Investigates Human Trafficking of Native Women and Children*, REWIRE NEWS (Sept. 28, 2017), <https://rewire.news/article/2017/09/28/sold-sex-senate-committee-investigates-human-trafficking-native-women-children/>.

⁸⁹ Victoria Tauli-Corpuz, *Indigenous Women’s Rights Are Human Rights*, CULTURAL SURVIVAL QUARTERLY MAGAZINE (Feb. 2018), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/indigenous-womens-rights-are-human-rights>.

⁹⁰ Policy Research Center, *Research Policy Update: Violence Against American Indian and Alaska Native Women*, NATIONAL CONGRESS OF AMERICAN INDIANS, 1, 2, (Feb. 2018), http://www.ncai.org/policy-research-center/research-data/prc-publications/VAWA_Data_Brief_FINAL_2_1_2018.pdf.

⁹¹ Suzette Brewer, *supra* note 88. Tracy Toulou, director of the Office of Tribal Justice in the Department of Justice, has stated that their “primary focus is on the victims...service providers who work with these people every day have said [providing data on ethnicity] would have a ‘chilling effect’ and that is why we’ve said it’s voluntary information, but we’re not going to mandate that from our grantees.” *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Indian Country is defined as “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

amount of anecdotal evidence because many Natives turn to the internet to find their loved ones rather than the government or authorities.⁹⁵

A. Bakken Oil Fields

Over 35 corporations extract oil on the Fort Berthold Reservation in North Dakota.⁹⁶ These extraction projects have brought over 100,000 men, who reside in man camps, as employees.⁹⁷ As a result, crime has skyrocketed, with a 10% increase in 2015.⁹⁸ Areas surrounding the man camps, primarily the Fort Berthold Reservation, “now have some of the highest rates of sex trafficking in the United States.”⁹⁹ As a result, Tribal police are overwhelmed and do not have the resources to keep surveillance on the man camps at all times.¹⁰⁰

However, when Natives are missing, especially children, the man camps are the first place they look.¹⁰¹ Grace Her Many Horses, Police Captain on the Fort Berthold Reservation and former Rosebud Sioux Tribal Police Chief, spoke about a 15-year-old boy that went missing and was found in one of the man camps with one of the oil workers.¹⁰² She stated that the workers “were passing him around from trailer to trailer.”¹⁰³ Similarly, the Tribal police found a 4-year-old girl running down a road beside a man camp while naked and crying.¹⁰⁴ Upon

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.” 18 U.S.C. § 1151 (2019); 40 C.F.R. § 171.3 (2017). *See also*, EPA, *Definition of Indian Country*, <https://www.epa.gov/pesticide-applicator-certification-indian-country/definition-indian-country> (last visited Nov. 13, 2018).

⁹⁵ Tom Lutey, *When government fails, indigenous women take their search for missing loved ones online*, BILLINGS GAZETTE (Mar. 10, 2019), https://billingsgazette.com/news/state-and-regional/mmiw/when-government-fails-indigenous-women-take-their-search-for-missing/article_94de0a6f-a07a-5242-8d73-0740be50404a.html.

⁹⁶ John Vibes, *Oil Company “Man Camps” in ND Terrorizing and Sex Trafficking Native American Kids and Adults*, ACTIVIST POST (Dec. 6, 2017), <https://www.activistpost.com/2017/12/oil-company-man-camps-nd-terrorizing-sex-trafficking-native-american-kids-adults.html>.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

further investigation of those residing at the man camp, the Tribal police found 13 sex offenders in the same camp where the girl was found.¹⁰⁵

B. Lake Superior, Minnesota

At alarming rates, Dakota and Ojibwe women in Minnesota have been trafficked from their reservations onto boats in Duluth, a port city, and sold to ships' crews and forced to remain onboard for months in international waters.¹⁰⁶ Ships are used to traffic Native women, children, and, in some cases, babies for both crews of the ships and as a delivery service to man camps working on large extraction projects.¹⁰⁷

C. Enbridge Line 3 Pipeline

The Environmental Impact Statement (EIS) refers to the impact new pipelines, along with the necessary man camps, could have on Native women and children and discusses trafficking specifically.¹⁰⁸ The EIS states:

Concerns have been raised regarding the link between an influx of temporary workers and the potential for an associated increase in sex trafficking, which is well documented, particularly among Native populations. . . . The addition of a temporary, cash-rich workforce increases the likelihood that sex trafficking or sexual abuse will occur. Additionally, rural areas often do not have the resources necessary to detect and prevent these activities. . . . To address the potential for sexual abuse or sex trafficking, Enbridge can fund or prepare and implement an education plan or awareness campaign around this issue with the companies and subcontractors it hires to construct, restore and operate the pipeline. Enbridge can also provide funding to local and [T]ribal law enforcement to identify and stop sex trafficking.

The impact statement glosses over the issue and offers to address the issues with educational campaigns and funding to Tribal law enforcement.¹⁰⁹ The EIS does

¹⁰⁵ *Id.*

¹⁰⁶ Cecily Hilleary, *Sex Traffickers Targeting Native American Women*, VOICE OF AMERICA (Nov. 18, 2015), <https://www.voanews.com/a/sex-traffickers-targeting-native-american-women/3063457.html>.

¹⁰⁷ *Id.* See also, Riayn Spaero, *Follow the Oil Trail and You'll Find the Girls*, LONGREADS (Mar. 2017), <https://longreads.com/2017/03/01/follow-the-oil-trail-and-youll-find-the-girls/>.

¹⁰⁸ Ann Manning, *Enbridge pipeline's ripple effect: Abuse of women and girls*, STAR TRIBUNE (Jan. 5, 2018), <http://www.startribune.com/enbridge-pipeline-s-ripple-effect-abuse-of-women-and-girls/468185863/>.

¹⁰⁹ *Id.*

not state where those funds would come from or how educational campaigns could be implemented.¹¹⁰

D. Dakota Access Pipeline

All along the route of the Dakota Access Pipeline, there were instances of trafficking of Native women and children, and of employees or supervisors using victims of trafficking as bargaining chips to build the pipeline more quietly.¹¹¹ In Lee County, Iowa, “an agent of the Texas pipeline company was alleged to have offered a farmer [sic] who did not want the pipeline crossing his land [sic] sex with two teenage girls.” The farmer recorded the conversation.¹¹² Further, in another Iowa county, a Native mother and daughter were protesting the pipeline “when a worker in a truck stopped and yelled, ‘How much for the girl?’”¹¹³ These instances are not new to Natives. They have become an unfortunate way of life. Extraction projects, and other associated projects bring horrible consequences to Native women and children, and it is being glossed over for the most part.

IV. Relevant Law and Consequences

A. Laws and Policies Governing Large Extraction Projects

Many of the extraction projects are contracted to contractors that are specialized in government projects. Contractors are subject to certain restrictions and requirements to be working the project at all, especially when Native Peoples are involved.¹¹⁴ Unfortunately, consultation, consent, and other mechanisms to ensure that Native people and Indigenous communities are not disparately impacted do not apply when federal Tribal recognition¹¹⁵ is absent.¹¹⁶

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ 36 C.F.R. § 800.16(m) (2017). *See also*, Alaska Native Claims Settlement Act of 1971, 43 U.S.C. § 1602 (2019); Exec. Order No. 13175, 3 C.F.R. § 13175 (2000); The Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. § 3001(7) (2019); The American Indian Religious Freedom Act of 1978, 42 U.S.C.A § 1996(ii) (2019).

¹¹⁵ 21 C.F.R. Part 83 (2015).

¹¹⁶ Federal recognition is a process that Tribes must go through via the Bureau of Indian Affairs and the Department of the Interior to receive benefits that accompany that recognition and participate in the trust relationship the U.S. Government has with Natives. This process can be relatively arbitrary. The Mashpee Wampanoag Tribe had an extremely difficult time receiving recognition. Even so, due to an erroneous interpretation of the 1934 Indian Reorganization Act, their recognition was stripped along with the land granted in 2015. Since 1980, only 35.8% of petitioning Native Nations have been granted recognition. Without recognition, Native Nations are not entitled to be consulted regarding projects in Indian Country and Indigenous communities.

There are specific standards that contractors must meet when bidding for federal contracts. Those standards set an extremely low bar and include criteria such as “hav[ing] adequate financial resources to perform the contract.”¹¹⁷ However, the contractor must “have a satisfactory record of integrity and business ethics.”¹¹⁸ Generally, a superficial code of business ethics and conduct is not enough when fulfilling the requirements of F.A.R. 3.1002 (Contractor Code of Business Ethics and Conduct) (“Code”).¹¹⁹

3.1002 states, “government contractors must conduct themselves with the highest degree of integrity and honesty.”¹²⁰ In order to fulfill that requirement, contractors must have a written code of business ethics and conduct,¹²¹ an employee training program, and an internal control system.¹²² The internal control system requires that it be suitable to both the size of the company and “its involvement in Government contracting,”¹²³ “facilitate timely discovery and disclosure of improper conduct in connection with Government [sic] contracts,”¹²⁴ and ensure that there are corrective measures that are instituted and carried out promptly.¹²⁵

Unfortunately, these are some of the only mentions of the requirements of contractors and their employees regarding their ethical actions. As a result, accountability for unethical actions by both employees and employers will probably not be addressed adequately within the company. The Contractor Code of Business Ethics and Conduct is exceptionally vague. Vagueness only insulates those that are willing to take advantage of it. Although a code of ethics is a step in the right direction, Natives cannot count on companies to hold themselves accountable. Additionally, the Code does not speak to any enforcement mechanisms whatsoever. Lack of enforcement only adds fuel to the notion that Natives cannot count on construction companies and contractors to act ethically in their communities.

Bruce Henderson, *Largest tribe in East called NC home for Centuries. Feds say it's not Indian enough*, THE CHARLOTTE OBSERVER (Mar. 11, 2019), <https://www.charlotteobserver.com/news/local/article224518065.html>; 21 C.F.R. Part 83.

¹¹⁷ 48 C.F.R. § 9.104-4(a) (2017).

¹¹⁸ *Id.* at (d).

¹¹⁹ Michael H. Payne, *Contractors Must Take Ethics Compliance Seriously*, FEDERAL CONSTRUCTION BLOG (Mar. 1, 2012), <https://federalconstruction.phslegal.com/2012/03/articles/procurement-information/contractors-must-take-ethics-compliance-seriously/>.

¹²⁰ FAR 3.1002(a).

¹²¹ *Id.* at (b).

¹²² *Id.*

¹²³ *Id.* at (b)(1).

¹²⁴ *Id.* at (b)(2).

¹²⁵ *Id.* at (b)(3).

B. Vetting Employees and Rates of Sex Offenders Currently Employed

The employment of sex offenders on extraction projects, due to their living arrangements in man camps on or near Indigenous communities and Indian Country, increases the risk of trafficking of Native women and children exponentially.¹²⁶ However, gaps are present in current government background checks regarding sex offender notifications because there is “no agencywide [sic] policy except in limited cases of national security concerns.”¹²⁷

A prominent example that exposed this loophole occurred in 2012 at the General Services Administration (GSA).¹²⁸ The employee had worked for the GSA for four years before he was arrested for “downloading child pornography on his home computer” of girls aged 10-15.¹²⁹ The employee had registered as a sex offender in Virginia but worked in the District of Columbia.¹³⁰ As a result, the GSA did not learn the employee was a sex offender until late 2013, more than 13 months after his conviction.¹³¹

This is the loophole: unless an employee works at a school or daycare facility, they do not have to notify their employer that they are a sex offender.¹³² Likewise, “local law enforcement doesn’t notify businesses or government entities outside the state where the crime occurred” of a person’s sex offender status.¹³³ The loophole only requires that the offender leave the state in which the crime occurred. Then the offender is both complying with the law and undermining the registry at the same time.¹³⁴

Additionally, employers are not required to look at registries because “they don’t have a legal duty to be aware that a worker is on the list.”¹³⁵ In some instances, state law prohibits using the registry to make hiring decisions.¹³⁶ This is

¹²⁶ Dan Boyce, *Booming Oil Fields May Be Giving Sex Trafficking A Boost*, NPR (Feb. 1, 2014), <https://www.npr.org/2014/02/01/265698046/booming-oil-fields-may-be-giving-sex-trafficking-a-boost>.

¹²⁷ Jeff Mordock, *Feds’ reporting loophole let GSA employee hide child porn conviction*, THE WASHINGTON POST (May 23, 2018), <https://m.washingtontimes.com/news/2018/may/23/federal-government-sex-offender-reporting-loophole/>.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

the case in California, and a \$25,000 fine can be imposed if the registry is consulted for hiring purposes.¹³⁷

Consequences of the lack of reciprocity concerning the registry can be dire. Recidivism rates show that 27% of offenders re-offend over a 20-year period.¹³⁸ Furthermore, 76% of offenders who were convicted of an internet-related crime against a child “also confessed to a contact crime with a minor that was never caught by law enforcement.”¹³⁹ The likelihood of recidivism is high with this population of offenders, and that is only exacerbated when they have access to any vulnerable populations, not just children in schools or daycare. When sex offenders are hired onto extraction projects and reside within man camps, they are put in a position with little to no consequences for re-offending.

C. Federal Indian Law and Tribal Jurisdictions

This history is extremely brief and is only to show a glimpse of the foundation that is at play regarding the interworking of Federal Indian Law and Missing and Murdered Indigenous Women and Girls.

The United States Supreme Court has increasingly eroded both Tribal Sovereignty and the trust relationship held between Federally Recognized Tribes and the United States Government. The *Marshall Trilogy*¹⁴⁰ established aboriginal title, barring Natives from selling their land to any entity other than the United States; solidified Congress’ plenary power over Native Nations;¹⁴¹ established that Native Nations are dependent domestic nations;¹⁴² and established that states could not enforce any law within Indian Country.¹⁴³ These cases were the first to subjugate Natives to the U.S. Government and forever hold Natives under their thumb.

¹³⁷ *Id.*; Elizabeth McLean, *Misuse of the Sex Offender Registry for Hiring has Spooky Consequences*, GOODHIRE (Oct. 5, 2016), <https://www.goodhire.com/blog/sex-offender-registry-restrictions-in-hiring>; CAL. PENAL CODE § 290.46(j)(4)(A) (effective as amended Jan. 1, 2022).

¹³⁸ Jeff Mordock, *supra* note 127.

¹³⁹ *Id.*

¹⁴⁰ *Johnson v. McIntosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832). *See also*, Matthew L.M. Fletcher, *A Short History of Indian Law in the Supreme Court*, 40 HUM. RTS. MAG. No.4 (Sept. 26, 2018), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol--40--no--1--tribal-sovereignty/short_history_of_indian_law/.

¹⁴¹ *McIntosh*, 21 U.S. 543. It’s important to note that terminology such as “savage” and phrases including: “But the [T]ribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people was impossible, because they were as brave and as high spirited as they were fierce, and were ready to repel by arms every attempt on their independence.” This case is still cited today and is good law. The opinion is riddled with overtly racist rhetoric and still has a large impact on myths, stereotypes, and othering within the profession of law today regarding Natives.

¹⁴² *Cherokee Nation*, 30 U.S. 1.

¹⁴³ *Worcester*, 31 U.S. 515.

Next, the Major Crimes Act¹⁴⁴ came as the result of *Ex parte Crow Dog*,¹⁴⁵ which held that there was no federal criminal jurisdiction over Indian-on-Indian crime in Indian Country.¹⁴⁶ Resulting litigation concerning the Major Crimes Act held that Congress has generalized interests to maintain order in Indian Country and protect Natives from the states.¹⁴⁷ Then, in litigation involving allotment, the Court held that there is a presumption that Congress is acting in good faith when acting on behalf of a Tribe.¹⁴⁸ Furthermore, Alaskan Natives do not have vested property rights, and the taking of that property is not subject to the Fifth Amendment Takings and Just Compensation Clause.¹⁴⁹

D. The General Crimes Act and the Major Crimes Act

The General Crimes Act¹⁵⁰ was passed in 1817.¹⁵¹ The Act granted federal criminal jurisdiction over crimes committed in Indian Country in which non-Indians are the perpetrators of crime against Indians.¹⁵² Additionally, the Act also applies to an Indian perpetrator against a non-Indian if the crime falls outside of the Major Crimes Act, and the offender has not been punished by the Tribe.¹⁵³ Crimes that are covered by the Act include arson, assault, maiming, theft, receiving stolen property, murder, manslaughter, and sexual offenses.¹⁵⁴ Furthermore, the Assimilative Crimes Act¹⁵⁵ was applied to Indian Country via the General Crimes Act and allows the federal government to use state law where federal law is lacking regarding a crime. However, the General Crimes Act does not apply to Indian-on-Indian crime; that is any crime which an Indian perpetrates against another Indian in Indian Country and has been punished by the Tribe, and where treaties have granted jurisdiction to the Tribe exclusively.¹⁵⁶

¹⁴⁴ 18 U.S.C. § 1153 (2019).

¹⁴⁵ *Ex parte Crow Dog*, 109 U.S. 556 (1883).

¹⁴⁶ *Id.*

¹⁴⁷ *United States v. Kagama*, 118 U.S. 375 (1886).

¹⁴⁸ *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

¹⁴⁹ *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955).

¹⁵⁰ 18 U.S.C. § 1152 (2019).

¹⁵¹ *Legal and Ethical Foundations for SANE Practice: Tribal Law*, OFFICE OF JUSTICE PROGRAMS, <https://www.ovcttac.gov/saneguide/legal-and-ethical-foundations-for-sane-practice/tribal-law/> (last visited Dec. 31, 2018).

¹⁵² 18 U.S.C. § 1152.

¹⁵³ *Id.*

¹⁵⁴ U.S. DEPT. OF JUSTICE, CRIMINAL RESOURCE MANUAL: THE GENERAL CRIMES ACT - 18 U.S.C. § 1152, <https://www.justice.gov/jm/criminal-resource-manual-678-general-crimes-act-18-usc-1152> (last visited Dec. 31, 2018).

¹⁵⁵ 18 U.S.C. § 13 (2019).

¹⁵⁶ CRIMINAL RESOURCE MANUAL: THE GENERAL CRIMES ACT, *supra* note 154.

The Major Crimes Act was passed in 1885 and covers seven crimes: murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny.¹⁵⁷ This Act granted the U.S. Government jurisdiction over Indian-on-Indian crime, but it did not extend jurisdiction to the states.¹⁵⁸

These two Acts together created concurrent jurisdiction with Tribal Governments. In doing so, Tribal Governments have concurrent jurisdiction for Indian-on-Indian¹⁵⁹ crime involving murder, manslaughter, kidnapping, maiming, sexual abuse under Ch. 109-A, incest, assault with intent to commit murder, assault with a dangerous weapon, assault resulting in serious bodily injury, assault on a person less than 16 years old, felony child abuse or neglect, arson, burglary, robbery, and theft under 18 U.S.C. §661.¹⁶⁰

Additionally, Tribes have concurrent jurisdiction over Indian and non-Indian crime involving the same crimes previously mentioned.¹⁶¹ However, non-Indian on Indian crime falls under federal jurisdiction for “all federal crimes which apply to the ‘special maritime and territorial jurisdiction of the United States under the U.S. Code,’” and any remaining crimes that are contained in state code where there is no federal statute.¹⁶² Furthermore, *Oliphant v. Suquamish Indian Tribe*¹⁶³ eliminated Tribal criminal jurisdiction over non-Indians perpetrators.

Oliphant limits Tribes’ punishment of non-Indians.¹⁶⁴ As a result, the Tribe cannot prosecute many crimes.¹⁶⁵ The most troubling is that Tribes do not have any jurisdiction over non-Indian perpetrated crime in Indian Country absent a delegation of such power from Congress. Again, 96% of Native women that experience sexual violence were abused by a non-Native.¹⁶⁶

¹⁵⁷ *General Guide to Criminal Jurisdiction in Indian Country*, TRIBAL COURT CLEARINGHOUSE, <https://www.tribal-institute.org/lists/jurisdiction.htm> (last visited Nov. 20, 2018).

¹⁵⁸ U.S. DEPT. OF JUSTICE, CRIMINAL RESOURCE MANUAL: THE MAJOR CRIMES ACT - 18 U.S.C. § 1153, <https://www.justice.gov/jm/criminal-resource-manual-679-major-crimes-act-18-usc-1153> (last visited Dec. 31, 2018).

¹⁵⁹ U.S. DEPT. OF JUSTICE, INDIAN COUNTRY CRIMINAL JURISDICTIONAL CHART 1, 1, <https://www.justice.gov/sites/default/files/usao-wdok/legacy/2014/03/25/Indian%20Country%20Criminal%20Jurisdiction%20ChartColor2010.pdf> (last visited Jan. 5, 2019). In this context, Indian is defined as “enrolled or recognized as Indian by a government entity and possessing some degree of Indian blood.” *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Oliphant*, 435 U.S. 191.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ Policy Research Center, *Research Policy Update: Violence Against American Indian and Alaska Native Women*, NAT’L CONG. OF AM. INDIANS 1, 2, (Feb. 2018), http://www.ncai.org/policy-research-center/research-data/prc-publications/VAWA_Data_Brief_FINAL_2_1_2018.pdf.

E. VAWA

The Violence Against Women Act (VAWA) was first enacted in 1994 and has been reauthorized three times, with the latest being 2013.¹⁶⁷ VAWA “sought to improve criminal justice and community-based responses to domestic violence, dating violence, sexual assault and stalking in the United States.”¹⁶⁸ VAWA is pivotal in Indian Country because it gave Tribes the ability to prosecute particular crimes concerning domestic violence.¹⁶⁹

VAWA 2013 “recognize[d] Tribes’ inherent power to exercise ‘special domestic violence criminal jurisdiction’ (SDVCJ) over individual defendants, regardless of their Indian or non-Indian status, who commit acts of domestic violence or violate specific protection orders in Indian [C]ountry.”¹⁷⁰ As a result, Tribes were able to begin prosecuting non-Indian abusers for domestic violence, dating violence, and criminal violations of protection orders in March 2015.¹⁷¹

Unfortunately, the types of crimes that VAWA 2013 does not give Tribes authority to prosecute include crimes outside of Indian Country, crimes between two non-Indians, crimes (even sexual assault) between two strangers, “crimes committed by a person who lacks sufficient ties to the [T]ribe, such as living or working on its reservation,” and child or elder abuse that does not involve a violation of a protection order.¹⁷² The restrictions in VAWA 2013 provide for massive loopholes in attempting to remedy Missing and Murdered Indigenous Women and Girls issues because the Act prevents the prosecution of crime perpetrated by strangers or sexual assault.¹⁷³

In order to participate in VAWA and SDVCJ, a participating Tribe must protect defendants’ rights in specific ways. A Tribe must protect the rights of defendants under the Indian Civil Rights Act (ICRA),¹⁷⁴ protect rights described

¹⁶⁷ The Violence Against Women Act Reauthorization of 2013, Pub. L. No. 113-4, 127 Stat. 54 (codified in scattered sections of 18 U.S.C., 22 U.S.C. and 42 U.S.C.).

¹⁶⁸ *What is the Violence Against Women Act?*, THE NAT’L DOMESTIC VIOLENCE HOTLINE, <https://www.thehotline.org/resources/vawa> (last visited Nov. 18, 2018).

¹⁶⁹ *Introduction to the Violence Against Women Act*, TRIBAL COURT CLEARINGHOUSE, https://www.tribal-institute.org/lists/title_ix.htm (last visited Nov. 18, 2018).

¹⁷⁰ U.S. DEPT. OF JUSTICE, VIOLENCE AGAINST WOMEN ACT (VAWA) REAUTHORIZATION 2013, <https://www.justice.gov/tribal/violence-against-women-act-vawa-reauthorization-2013-0> (last updated March 26, 2015).

¹⁷¹ *Id.* When VAWA 2013 was first implemented, only a few Tribes were allowed to participate in the pilot program. The Pascua Yaqui Tribe of Arizona, the Tulalip Tribes of Washington, the Umatilla Tribes of Oregon, the Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, and the Sisseton Wahpeton Oyate of the Lake Traverse Reservation were involved in the pilot project. *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*; The Indian Civil Rights Act, 25 U.S.C. §§ 1301-1304 (2019).

in the Tribal Law and Order Act (TLOA),¹⁷⁵ provide a “fair cross-section of the community in jury pools” and not “systematically exclude non-Indians,” and must inform defendants that they have the right to federal *habeas corpus* petitions.¹⁷⁶

Plainly, defendants must be provided with, as required by either TLOA and/or VAWA:

1. “Effective assistance of counsel equal to at least that guaranteed in the U.S. Constitution.”¹⁷⁷
2. Counsel “licensed to practice by any jurisdiction” in the U.S. at the Tribal Government’s expense.¹⁷⁸
3. Counsel that is “licensed by a jurisdiction that applies appropriate licensing standards and effectively ensures the competence and professional responsibility of its licensed attorneys.”¹⁷⁹
4. “Judges [that] presid[e] over criminal proceedings subject to enhanced sentencing/ non-Indian defendants have sufficient legal training to preside over criminal trials.”¹⁸⁰
5. Judges that preside “over criminal proceedings subject to enhanced sentencing/ non-Indian defendants are licensed to practice law by any jurisdiction in the United States.”¹⁸¹
6. “The [T]ribe’s criminal law, rules of evidence, and rules of criminal procedure [] made available to the public prior to charging the defendant.”¹⁸²
7. A “Tribal court [that] maintains a record of the criminal proceeding, including an audio or other recording.”¹⁸³
8. A facility that passes “the BIA jail standards for long-term incarceration” for defendants sentenced to “greater than 1-year imprisonment.”¹⁸⁴
9. The right to a trial by an impartial jury provided by Tribal court.¹⁸⁵
10. A jury pool that “reflects a fair cross section of the community” ensured by Tribal court.¹⁸⁶

¹⁷⁵ The Tribal Law and Order Act of 2010, Pub. L. No. 111-121, 124 Stat. 2258 (codified in scattered sections of 18 U.S.C., 25 U.S.C. and 42 U.S.C.).

¹⁷⁶ VIOLENCE AGAINST WOMEN ACT (VAWA) REAUTHORIZATION 2013, *supra* note 170; Tribal Law and Order Act of 2010.

¹⁷⁷ *Introduction to the Violence Against Women Act*, *supra* note 169.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

11. A jury that is “drawn from sources that do not systematically exclude any distinctive group in the community, including non-Indians,” and ensured by Tribal court.¹⁸⁷
12. Timely notification of defendants’ rights and responsibilities when detained under SDVCJ.¹⁸⁸
13. A notification that the defendant has the right to “file ‘a petition for a writ of habeas corpus in a court of the United States.’”¹⁸⁹
14. A Tribal court that ensures that “‘all other rights whose protection is necessary under the Constitution of the United States in order for Congress to recognize and affirm the inherent power of the participating Tribe to exercise [SDVCJ] over the defendant’ are provided.”¹⁹⁰
15. A Tribal court that ensures “‘all applicable rights under the [SDVCJ] provisions’ are provided.”¹⁹¹

As shown, these three Acts are significantly intertwined. Tribes practicing SDVCJ must protect rights according to all three, but in order to even be eligible to prosecute the defendant, Tribes must also meet requirements laid out in the three Acts. Defendants, pursuant to TLOA, must: “either (1) previously have been convicted of same or comparable offense by any jurisdiction in [the] U.S.; or (2) is being prosecuted for a “felony” (an offense that would be punishable by more than 1 year imprisonment if prosecuted by [the] U.S. or any of the States).”¹⁹² Additionally, under VAWA, defendants may “be prosecuted for either (1) domestic violence, (2) dating violence, or (3) violation of a protection order.”¹⁹³

Although VAWA 2013 is a step in the right direction regarding Tribal Sovereignty and the ability to address domestic violence of Native women, it is an arduous process and is often tricky for Native Nations to meet the requirements to participate.¹⁹⁴ As a result, only 18 Tribes¹⁹⁵ have implemented VAWA out of 573

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ If you are interested in helping Native Nations implement VAWA, contact “Mr. Tracy Toulou, Director of Tribal Justice, Department of Justice, at (202) 514-8812 ... or e-mail OTJ@usdoj.gov.” *Id.*

¹⁹⁵ *SDVCJ Today: Implementing Tribes – 5 Years In*, NAT’L CONG. OF AM. INDIANS, <http://www.ncai.org/tribal-vawa/the-first-five-years/nation-wide-implementation> (last visited Nov. 20, 2018). The Tribes that have implemented VAWA are the Pascua Yaqui Tribe in Arizona, the

that could implement it if they met the requirements.¹⁹⁶ To meet the requirements, many Native Nations had to “rewrite large portions of their Tribal code or amend their constitutions to comply with the statute.”¹⁹⁷ Additionally, several Nations had to “build or contract for additional services – such as counsel for indigent defendants – that either did not exist or the Tribe could not easily expand to non-Indian defendants.”¹⁹⁸ Other changes were required as well, but the “process required significant time and resources on the part of the [T]ribe.”¹⁹⁹

Unfortunately, in February of 2019, VAWA was not extended and was allowed to lapse.²⁰⁰ The funding bill that was passed did not include a reauthorization of VAWA because Democrats have expressed interest in a plan to completely overhaul the legislation in the near future.²⁰¹ However, a Democratic aid stated that we should expect a full re-authorization to be introduced sometime in March and stated further that there would be “no impact” to those that are affected most by the Act in the face of the lapse.²⁰² Seemingly, only funding to Native Nations to assist with the implementation of VAWA is at play. Jurisdiction will not lapse.²⁰³

Lack of funding for Native Nations to implement VAWA is nothing new. Congress authorized \$25 million to Nations in the form of grants for the years 2014-2018 to help ease costs of implementing VAWA.²⁰⁴ Unfortunately, those funds have yet to be appropriated.²⁰⁵

Tulalip Tribes in Washington, the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) in Oregon, The Assiniboine and Sioux Tribe of the Fort Peck Indian Reservation in Montana, the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation in North and South Dakota, the Little Traverse Bay Band of Odawa Indians in Michigan, the Alabama-Coushatta Tribe of Texas, the Choctaw Nation in Oklahoma, the Eastern Band of Cherokee Indians in North Carolina, the Seminole Nation in Oklahoma, the Sac and Fox Nation in Oklahoma, the Kickapoo Tribe of Oklahoma, the Nottawaseppi Huron Band of Potawatomi in Michigan, the Muscogee (Creek) Nation in Oklahoma, the Standing Rock Sioux Tribe in North and South Dakota, the Sault Ste. Marie Tribe of Chippewa in Michigan, the Chitimacha Tribe of Louisiana, and the Lower Elwha Klallam Tribe in Washington. *Id.*

¹⁹⁶ *Federal and State Recognized Tribes*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/state-tribal-institute/list-of-federal-and-state-recognized-tribes.aspx> (last visited Jan. 3, 2019).

¹⁹⁷ NAT'L CONG. OF AM. INDIANS, VAWA 2013'S SPECIAL DOMESTIC VIOLENCE CRIMINAL JURISDICTION (SDVCJ) FIVE-YEAR REPORT 5 (2018) http://www.ncai.org/resources/ncai-publications/SDVCJ_5_year_Report.pdf.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Sophie Tatum, Phil Mattingly & Ashley Killough, *Funding bill leaves out Violence Against Women Act extension*, CNN (Feb. 15, 2019), <https://www.cnn.com/2019/02/15/politics/violence-against-women-act-spending-bill/index.html>.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ U.S. DEPT. OF JUSTICE, VIOLENCE AGAINST WOMEN ACT (VAWA) REAUTHORIZATION 2013, <https://www.justice.gov/tribal/violence-against-women-act-va-wa-reauthorization-2013-0> (last updated March 26, 2015).

²⁰⁵ *Id.*

VAWA is one of the single most important pieces of legislation in recent history to combat Missing and Murdered Indigenous Women and Girls. Even so, there are many improvements still needed. The most significant changes would close loopholes that allow a lapse in jurisdiction for stranger sexual violence and abuse against children. Now with more awareness regarding the Missing and Murdered Indigenous Women and Girls phenomenon, it seems as though some of those loopholes that are the most dangerous may be fixed by the overhaul of the Act.

F. Comparative View with International Standards²⁰⁶

The United States has a poor record of adhering to international human rights standards. Even so, there are three main international mechanisms that apply to the United States: the International Labor Organization (ILO); the Inter-American Commission on Human Rights (IACHR); and some of the United Nations (U.N.) Treaty Bodies. However, generally, if a State²⁰⁷ has not consented or ratified a treaty or jurisdiction, the State is not beholden to those specific standards outlined in the unratified treaties or jurisdictions. This sub-section walks through the three bodies that the United States participates in and pulls at various conventions, treaties, and notions that are applicable to the United States and the Missing and Murdered Indigenous Women and Girls phenomenon.

1. International Labor Organization

The International Labor Organization (ILO) has existed since 1919.²⁰⁸ The mission of the ILO is to bring together “governments, employers and workers of 187 member states, to set labour standards, develop policies and devise programmes promoting decent work for all women and men.”²⁰⁹ The United States joined the ILO in 1934, which at that time was a sub-organization of the League of Nations.²¹⁰

²⁰⁶ The international case law from all of these mechanisms is expansive. Going through that case law to the degree needed was not possible in this note. However, I plan on writing a complimentary piece that will highlight the international case law extensively in regards to the Missing and Murdered Indigenous Women and Girls phenomenon and the duties the U.S. Government owes.

²⁰⁷ In international law, a State refers to the country in question rather than a region within the country. For example, the United States is a State and Texas is a state within the State.

²⁰⁸ *Tripartite constituents*, INT’L LABOUR ORG., <https://www.ilo.org/global/about-the-ilo/who-we-are/tripartite-constituents/lang--en/index.htm> (last visited Aug. 23, 2019).

²⁰⁹ *Id.*

²¹⁰ *Brief history and timeline (ILO-USA)*, INT’L LABOUR ORG., <https://www.ilo.org/washington/ilo-and-the-united-states/brief-history-and-timeline/lang--en/index.htm> (last visited Aug. 23, 2019).

To date, the United States has ratified 12 Conventions of the ILO.²¹¹ However, only two are relevant to trafficking and Missing and Murdered Indigenous Women and Girls. The two conventions are C105,²¹² Abolition of Forced Labour, and C182,²¹³ Worst Forms of Child Labour. These conventions speak directly to the trafficking of women and children, but they do not speak directly towards Native people and Indigenous communities.

Articles 1 and 2 of C105 require that the member State should “undertake[] [the responsibility] to *suppress* and not make use of any form of forced or compulsory labour . . . (e) as a means of racial, social, national or religious discrimination.”²¹⁴ The correlation between extraction projects and the trafficking of Native women and children arguably fit under these provisions of C105 because the United States is not taking the proper action to suppress forced and compulsory sex work, or sex trafficking of Native women and children. The purposeful ambiguities and lack of Tribal jurisdiction, lack of funding to Tribal police departments, and lack of continuity regarding sex offender registries, all are substantial factors and arguments for a violation of Article 1 and 2 of C105.

Additionally, articles 1, 2, and 3 of C182 state that the member State must:

Take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency . . . [concerning children] under the age of 18 . . . (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children . . . (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances.²¹⁵

Similar arguments apply to C182 as C105. The United States is only hindering measures that have been put in place to prohibit and eliminate sex trafficking of Native children in particular. The two most significant issues are the lack of resources of Tribal police departments and the lack of continuity regarding sex offender registries.

Additionally, agencies such as the EPA approve large extraction projects through a permitting process. As was seen in the Dakota Access Pipeline Case

²¹¹ The United States has in fact ratified 14 Conventions, but only 12 are in force. *Ratifications for United States*, INT'L LABOUR ORG., https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102871 (last visited Aug. 23, 2019).

²¹² Convention concerning the Abolition of Forced Labour (No. 105), June 25, 1957, 320 U.N.T.S. 291, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312250:NO (last visited Aug. 23, 2019).

²¹³ Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No. 182), June 17, 1999, 38 I.L.M. 1207, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312327:NO (last visited Aug. 23, 2019).

²¹⁴ Convention concerning the Abolition of Forced Labour, *supra* note 212 (emphasis added).

²¹⁵ Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, *supra* note 213.

Study, contractors and employees working on these projects are using young girls, women, and children as sex slaves to keep those that disagree with the pipeline quiet. This is happening even though the EPA has issued EIS statements that acknowledge the harm man camps have on Native communities and Indian Country regarding Missing and Murdered Indigenous Women and Girls and trafficking. Nevertheless, the EPA grants permits to projects without ensuring that there are effective remedies in place to mediate the harm Indigenous communities and Indian Country face. As a result, the United States clearly is not suppressing or taking immediate and effective measures to remedy the trafficking of Native women and children.

2. Inter-American Commission on Human Rights

The Inter-American Commission on Human Rights (IACHR) is a product of the Organization of American States (OAS) and is one of the bodies of the Inter-American system.²¹⁶ The mission of the IACHR is to “promote and protect human rights in the American hemisphere.”²¹⁷ All member States are beholden to the American Declaration of the Rights and Duties of Man.²¹⁸ Additionally, the IACHR is accompanied by the Inter-American Court of Human Rights (the Court).²¹⁹ The United States joined OAS in 1948,²²⁰ and IACHR was created by the OAS in 1959.²²¹

The United States has never acknowledged the jurisdiction of the Court and therefore is not privy to that jurisdiction, and the Court cannot assert jurisdiction over the United States.²²² Even so, decisions made at the court amend the American Declaration of the Rights and Duties of Man and therefore those decisions still impact member states of the OAS but have not ratified jurisdiction of the Court.²²³ Unfortunately, because the United States has not ratified the jurisdiction of the Court, findings of the IACHR are only persuasive and are not binding.²²⁴

Even though these standards are only persuasive, it is still important to walk through this mechanism regarding the Articles that apply to the Missing and

²¹⁶ *What is the IACHR?*, ORG. OF AM. STATES, <http://www.oas.org/en/iachr/mandate/what.asp> (last visited Aug. 23, 2019).

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Member States*, ORG. OF AM. STATES, http://www.oas.org/en/about/member_states.asp (last visited Aug. 23, 2019).

²²¹ *What is the IACHR?*, *supra* note 216.

²²² *I/A Court History*, INTER-AM. COURT OF HUMAN RIGHTS, <http://www.corteidh.or.cr/historia-en.cfm> (last visited Aug. 23, 2019).

²²³ *Id.*

²²⁴ *Id.*

Murdered Indigenous Women and Girls phenomenon. The most relevant provisions of the Declaration are Articles 1, 2, 6, 14, 15, and 26.

Article 1 states that every individual has a “right to life, liberty and personal security.”²²⁵ Here, Native women and children are stripped of their life, liberty and personal security because the perpetrators are not properly prosecuted for their crimes against Natives, and therefore perpetrators are allowed to continually re-offend even though lives are lost. Additionally, even if Native women and children are not trafficked or victimized, the rates of victimization are so high that Native women and children need to be hypervigilant. As a result, the quality of life is greatly impacted, and liberty and personal security are certainly compromised.

Article 2 states that every individual has a “right to equality before the law.”²²⁶ Here, those that perpetrate crimes against Native and Indigenous communities are not being treated equally under the law due to jurisdictional issues, lack of funding, etc., and as a result, the victims are not provided with the same recourses as compared to other populations.

Article 6 states that every individual has a “right to family and protection thereof.”²²⁷ Here, Native peoples and Indigenous communities are losing their loved ones at alarming rates. Due to jurisdictional issues and lack of funding, these families have no way to protect themselves from the harm done by those that reside in man camps.

Article 14 states that every individual has a “right to work and to fair remuneration.”²²⁸ Here, Native women and children are not afforded proper work conditions or remuneration when they are trafficked. On the contrary, they are slaves and are lucky to survive their ordeal. As a result, Article 14 is violated due to the nature of their “employment.” Although it is not the United States that “employs” Native children, the United States and the laws that are implemented contribute greatly to the cost-benefit analysis that traffickers partake in when selecting victims and participating in this line of “work.” For the traffickers, the benefits of trafficking Native children greatly outweigh the costs.

Article 15 states that every individual has a “right to leisure time and to the use thereof.”²²⁹ When Native women and children are trafficked, they are stripped of their ability to use their free time for their spiritual, cultural, and physical benefit. Instead, they are beholden to others in the hope of survival, and again, are slaves.

Article 26 states that every individual has a “right to due process under the law.”²³⁰ Here, the argument is similar to the argument given for Article 2; however, it is essential to flesh out that when the law is not applied equally, then

²²⁵ O.A.S. Res. XXX, American Declaration of the Rights and Duties of Man art. 1, OEA/Ser. LV/I.4 Rev. (May 2, 1948), <https://www.oas.org/en/iachr/mandate/Basics/declaration.asp>.

²²⁶ *Id.* at art. 2.

²²⁷ *Id.* at art. 6.

²²⁸ *Id.* at art. 14.

²²⁹ *Id.* at art. 15.

²³⁰ *Id.* at art. 26.

the victim, in a way, is also implicated. On the face, this argument may seem controversial. On the other hand, those employed by contractors that reside in man camps know that they can get away with doing what they please to Native women and children. As a result of the law applying differently due to jurisdictional issues, victims are left to the wayside.

The evidence clearly supports one or more violations of the provisions of the Declaration. A violation of one is enough to grant a hearing in the IACHR in which the Commission would issue findings²³¹ and recommendations²³² for the United States.²³³ Although the United States does not promote these acts or condone them, it is enabling the problem.

3. United Nations Treaty Bodies

The United States also has a problematic history with the U.N. and the human rights treaty bodies and other human rights mechanisms. However, the United States has ratified 3 relevant treaties: the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP); the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography (CRC-OP-SC).²³⁴

i. UNDRIP

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is an instrument adopted by the United Nations in 2007.²³⁵ The mission of UNDRIP is to “protect[] collective rights that may not be addressed in other human rights charters that emphasize individual rights, and [] also safeguard[] the individual rights of Indigenous [P]eople.”²³⁶

²³¹ Hearings at the IACHR are similar to court proceedings; however, there is no jury and the Commissioners act similar to judges and ask questions of the complainant and respondent after their oral argument.

²³² Again, IACHR has no binding authority over the United States or any other member State. A member State must consent to the jurisdiction of the Court to receive binding authority. Even so, the Commission will still issue their decision with recommendations on how to come into compliance with international standards for human rights for the particular member State.

²³³ *I/A Court History*, INTER-AM. COURT OF HUMAN RIGHTS, <http://www.corteidh.or.cr/historia-en.cfm> (last visited Aug. 23, 2019).

²³⁴ *Ratification Status for United States of America*, U.N. HUMAN RIGHTS BODY DATABASE, https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx (last visited Feb. 10, 2019).

²³⁵ G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Dec. 13, 2007).

²³⁶ *UN Declaration on the Rights of Indigenous Peoples*, INDIGENOUS FOUNDATIONS., https://indigenousfoundations.arts.ubc.ca/un_declaration_on_the_rights_of_indigenous_peoples/ (last visited Aug. 23, 2019).

The United States initially did not support UNDRIP but has since changed its position. However, Sheryl Lightfoot, Ojibwe political scientist, believes that compliance is “lukewarm at best”.²³⁷ She points to the United States using terms such as “aspirational” and “non-binding” in official documents.²³⁸ Lightfoot observes that compliance is “often concentrated in ‘soft rights,’ such as rights to language and culture, while systematically denying ‘hard rights,’ such as rights to land.”²³⁹

Although the United States’ stance on UNDRIP is complicated, the United States has adopted the provision. As a result, the U.S. needs to take the responsibilities and duties to Indigenous Peoples earnestly and strive to adhere to those principles.

ii. CERD

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) was ratified by the U.S. in 1994.²⁴⁰ CERD aims to enable all member States to “promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion.”²⁴¹

The United States, via the permitting process for large extraction projects, practices environmental racism. Environmental racism is shown primarily through the EIS statement that was referred to earlier in the Case Studies section. Those that have the power to permit the projects also have the power to ensure that the Missing and Murdered Indigenous Women and Girls phenomenon is mediated. However, agencies gloss over the issues and only mention it in passing. As a result, the United States is not promoting and encouraging universal respect to all peoples.

iii. CRC-OP-SC

The Optional Protocol to the Convention on the Rights of the Child on the Sale of children, Child Prostitution and Child Pornography was ratified by the United States in 2002.²⁴² This Optional Protocol aims to enable member States to do just as the name suggests: protect children from trafficking, prostitution, and pornography.²⁴³

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

²⁴¹ *Id.*

²⁴² *Status of Ratification Interactive Dashboard: Ratification of 18 International Human Rights Treaties*, U.N. HUMAN RIGHTS, <http://indicators.ohchr.org/> (last visited Aug. 23, 2019).

²⁴³ G.A. Res. 54/263, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (May 25, 2000).

Unfortunately, by allowing the loopholes in the sexual offender registries, the United States is enabling Native children to be trafficked and sexually abused. It is difficult for sexual offenders to obtain jobs and many flock to the oil fields and pipeline construction. However, there is no regulation of the man camps and the harms they pose to Native communities, especially given that there is a high percentage of predators residing in these “neighborhoods.” As a result, the United States, again, is contributing to the sexual abuses of Native children.

V. Recommendations and Conclusions

A. Recommendations

From the facts and law provided, it is clear that the United States is in the best situation to assist Native Nations in addressing the Missing and Murdered Indigenous Women and Girls phenomenon. The United States has the ability to ensure that Native Nations have the necessary resources to participate in VAWA. The United States has the power to tighten the jurisdictional loopholes present in VAWA and other legislation when Native Nations attempt to prosecute non-Indian offenders. The United States also has the power to help change stereotypes and other misconceptions and myths that stem from ignorance. It is important to emphasize that the United States enabled and even directly caused the disparate violence and trafficking Native women experience in Native communities and Indian Country. As a result, they have even more power and responsibility to assist Native Nations. There are five recommendations this note poses for the United States to begin to solve the Missing and Murdered Indigenous Women and Girls phenomenon.

First, funding to Tribal governments is critical. Given that meeting the SDVCJ requirements can take enormous amounts of time and resources from Native Nations, the United States needs to ensure that compliance with requirements of VAWA is actually attainable so that Native Nations may participate in SDVCJ to protect their Native women.

Thus far, only 18 Native Nations participate in VAWA. The Missing and Murdered Indigenous Women and Girls phenomenon has been prevalent since colonization, and until recently, Native Nations have not had much power to prosecute these offenses. It is unclear how many other Nations will be able to begin participating in the near future due to the arduous process Nations will have to go through to meet the requirements. To better protect Native women, which is the goal of the VAWA 2013 Reauthorization, Congress must be sure to allocate the appropriate amount of funds and resources to each Nation.

Second, federal legislation needs to be passed that will close the Tribal jurisdictional gaps. Tribes lack jurisdiction to prosecute serious crimes that greatly contribute to the Missing and Murdered Indigenous Women and Girls

phenomenon. As a result, depending on the circumstance and the state, the jurisdiction to prosecute these crimes falls to federal and state court systems.

Third, the United States must create and manage an interstate sex offender registry. Sexual offenders have a relatively high propensity to re-offend. As a society and government, we require sexual offenders to register to help protect against further offenses. The fact that there is no reciprocity between states for registries is counter-intuitive and only contributes to the complex problem of Missing and Murdered Indigenous Women and Girls in the United States.

Furthermore, government contractors and sub-contractors should have to verify their employees against sexual offender registries, especially when the project is close to Indian Country and other vulnerable populations. Given that there is an awareness within man camps and contracting networks that Native women and children are incredibly vulnerable to violence and trafficking they should take extra care in ensuring their employees will not “go hunting” within Native communities and Indian Country.

Fourth, the United States should require free, prior, and informed consent of Tribes for any new projects that may affect Tribes and their lands. UNDRIP and other human rights mechanisms require that free, prior, and informed consent be secured from Indigenous Peoples before projects occur that will have irreparable impacts on the community and environment. Requiring informed consent would lessen the impact that man camps have on Native communities and Indian Country.

Fifth, it is imperative for the United States to sign on to and ratify all relevant international human rights treaties and provisions. As with domestic law, it is vital to make law binding and make those within a State accountable in order to effectively prosecute and remedy situations. If there is no way to hold the United States accountable, it will be difficult to see any meaningful change anytime in the near future.

B. Conclusion

Native women and children are trafficked at astronomical rates. Rates of trafficking increase dramatically when man camps are used at extraction projects. Currently, those exact rates are difficult to ascertain due to a lack of funding, lack of training, jurisdictional issues, and a general lack of awareness regarding the issue. However, Native peoples, Indigenous communities, allies, activists, etc., are bringing attention to the issue, unfortunately by bringing attention to the loved ones they have lost.

Native peoples are disparately impacted by trafficking, violence, and crime. There is no doubt that the reality of colonialism and genocide Native peoples have experienced is a large factor of their suffering today. As a result, the United States has a duty to take a more active role concerning the well-being of Native peoples and addressing fundamental international human rights concerns.

As of now, the United States is not adhering to the responsibilities that come with international human rights standards. However, the United States has made some progress with domestic legislation such as ICWA and VAWA.

Nevertheless, the United States could, and should, do so much more to combat the Missing and Murdered Indigenous Women and Girls phenomenon because it is in the best position to do so.

The United States, at a minimum, should begin to do the following immediately to alleviate the Missing and Murdered Indigenous Women and Girls phenomenon. First, legislation needs to be implemented at the federal level that will close the jurisdictional loopholes that strip Tribal jurisdiction from these sorts of crimes. Second, funding needs to be made available to Tribal police departments and other necessary entities for both enforcement and data collection. Third, vetting of employees before work begins is critical, with special attention given to reciprocity and availability of the sex offender registry. Fourth, free, prior, and informed consent needs to occur – without exception – when proposed projects may impact Indigenous communities. Fifth, Congress must ratify all relevant treaties with international mechanisms in order to begin compliance with human rights concerns. In taking these actions, the United States would be in a far better place to address the Missing and Murdered Indigenous Women and Girls phenomenon.