

# NICHUSAK



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Re: Shadow Report before the United Nations Committee on the Elimination of Racial Discrimination (CERD Committee), 107th Session, Geneva, 8-30 August 2022

Dear CERD Committee:

## I. Reporting Organization

Nichusak (“my women friends”) is a women-led working group composed of social activists, lawyers, and artists of Lenape Center. Nichusak focuses on issues surrounding the Missing and Murdered Indigenous Peoples (MMIP) crisis in Lenapehoking. Nichusak’s mission is to center Indigenous voices and promote the safety and wellbeing of Indigenous peoples through policy advocacy, social engagement, and artistic expression. Nichusak collaborates and supports established advocacy and awareness efforts surrounding the MMIP crisis. The group works to add meaningfully and substantively to the existing conversations, raise awareness, advocate, and educate the public on the MMIP crisis. Nichusak works on restorative justice with a focus on the prevention of MMIP and its consequences for families, communities, and society.<sup>1</sup>

## II. Issue Summary

The United States continues to violate several CERD articles, including Articles 2(2), 5 and 6<sup>2</sup> given: (1) the federal government’s mishandling and lack of investigations and prosecutions for crimes committed against Indigenous persons that fall within federal jurisdiction; (2) the federal government’s insufficient policies and funding for protection of Indigenous persons; and (3) the government’s incomplete data collection methods, the refusal to fund Tribal Nations own data collection, and the refusal to grant to Tribal governments access to data that pertain to Indigenous individuals and communities.

Existing long before the United States government, Tribal governments kept their citizens safe without the interference of colonial powers and today continue to understand what solutions will ensure community safety. Predicated on centuries of historical colonial

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<sup>1</sup> This Report was drafted with the assistance of Benjamin N. Cardozo School of Law’s Benjamin B. Ferencz Human Rights and Atrocity Prevention Clinic. Nichusak would like to thank Brett Jones (’23), Jillian Leavey (’24), and Sarah Brody (’24) for their research and drafting assistance.

<sup>2</sup> [International Convention on the Elimination of All Forms of Racial Discrimination](#) arts. 2(2), 5, 6, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter CERD].

violence, including genocide,<sup>3</sup> land dispossession,<sup>4</sup> forced displacement,<sup>5</sup> forced removal of children to boarding schools,<sup>6</sup> and rape,<sup>7</sup> the United States continues to perpetuate violence against Native peoples through *inter alia* multiple and intersecting direct and institutionalized discrimination, including racism and sexism. The crisis of MMIP that Indigenous communities in the US face today is the result of the United States' settler colonial violence that began with conquest and continues to the present on the bodies of Indigenous women, girls, two-spirit, and gender diverse individuals.

The United States government repeatedly has failed Indigenous peoples through state policies and practices.<sup>8</sup> Indigenous persons, especially Indigenous women, girls, two-spirit, and gender-diverse individuals, face institutionalized discrimination, racism, and sexism. American Indian and Alaska Native (AI/AN) women, for instance, are far more likely than non-Indigenous women to be targets of crime.<sup>9</sup> Much of the violence committed against Indigenous women is perpetrated by non-Indigenous men.<sup>10</sup> While Indigenous persons account for less than 3% of the total population in the United States, AI/AN persons experience violence at disproportionate rates compared to other groups.<sup>11</sup> The total number of missing and murdered

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<sup>3</sup> Much of the United States government's historical interactions with Indigenous populations fall within the definition of genocide. [Convention on the Prevention and Punishment of the Crime of Genocide](#) art. 2, Dec. 9, 1948, 78 U.N.T.S. 277. Practices such as forced displacement and coerced cultural assimilation were committed with the intent to destroy the identities and lives of Indigenous peoples, primarily in the name of dispossessing Indigenous communities of their ancestral lands. See AMNESTY INT'L, [THE NEVER-ENDING MAZE: CONTINUED FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA](#) 23-25 (2022). See also U.S. COMM'N ON CIV. RTS., [BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS](#) 3 (2018) [hereinafter BROKEN PROMISES]; see generally JEFFREY OSTLER, *SURVIVING GENOCIDE: NATIVE NATIONS AND THE UNITED STATES FROM THE AMERICAN REVOLUTION TO BLEEDING KANSAS* (2019). Even though the United States signed the Convention on the Prevention and Punishment of the Crime of Genocide at its inception in 1948, the United States did not ratify the Convention until 40 years later in 1988. See [18 U.S.C. § 1091](#).

<sup>4</sup> See [Johnson v. M'Intosh](#), 21 U.S. 543 (1823) (US Supreme Court decision extinguishing Indigenous title to their native lands). The Indian Removal Act continued federal policy of forcibly displacing Indigenous people, removing thousands of people from their ancestral lands, and forcing them to reside on land further to the west. Though the exact number is disputed, this practice of forced removal killed thousands of Indigenous people. See [Indian Removal Act](#), ch. 148, 4 Stat. 411 (1830).

<sup>5</sup> See [Johnson v. M'Intosh](#), 21 U.S. 543; [Indian Removal Act](#), ch. 148, 4 Stat. 411 (1830).

<sup>6</sup> See BRYAN NEWLAND, BUREAU OF INDIAN AFF., [FEDERAL INDIAN BOARDING SCHOOL INITIATIVE INVESTIGATIVE REPORT](#) 6-8 (2022). In the years between 1819 and 1969, the US government operated or supported Indian boarding schools, aiming to assimilate Indigenous children. These children were forced to use English names and actively were prevented from the use of Indigenous languages, religions, and cultural practices. While the institutions purported to provide education, Indigenous children were abused and killed at these boarding schools. The US Department of the Interior has identified at least 53 burial sites across boarding school locations and expects to find more unmarked burial sites as their investigation continues. *Id.*

<sup>7</sup> See AMNESTY INT'L, *supra* note 3, at 7.

<sup>8</sup> Catherine E. Lhamon, *Letter of Transmittal* for U.S. COMM'N ON CIV. RTS., [BROKEN PROMISES: CONTINUING FEDERAL FUNDING SHORTFALL FOR NATIVE AMERICANS](#) (2018).

<sup>9</sup> See ANDRÉ B. ROSAY, NAT'L INST. OF JUST., [VIOLENCE AGAINST AMERICAN INDIAN AND ALASKA NATIVE WOMEN AND MEN](#) 2-3 (2016).

<sup>10</sup> See [S. REP. NO. 112-153](#), at 9 (2012); see also [ROSAY](#), *supra* note 9, at 45-46. In examining four different forms of interpersonal violence (sexual violence, physical violence by intimate partners, stalking, and psychological aggression by intimate partners), the National Institute of Justice found that AI/AN survivors are statistically more likely than non-Hispanic white-only survivors to have experienced abuse from an interracial perpetrator. 97% of female AI/AN survivors, and 90% of male survivors, have experienced violence from an interracial perpetrator. *Id.*

<sup>11</sup> Nicholas Jones et al., [2020 Census Illuminates Racial and Ethnic Composition of the Country](#), U.S. CENSUS BUREAU (Aug. 12, 2021); See Nicole Chavez & Harmeet Kaur, [Why the Jump in the Native American](#)

Indigenous persons in the United States is unknown.<sup>12</sup> As of 2016, more than 5,500 Indigenous women and girls have been reported missing or murdered.<sup>13</sup> Only 116 of them were logged into the US Department of Justice's databases.<sup>14</sup> AI/AN individuals also are more likely to be incarcerated than those of other racial groups.<sup>15</sup>

Indigenous women face high rates of violence due to deeply rooted racism and settler colonialism in the United States.<sup>16</sup> In some parts of Indian Country, where only 30% of the Indigenous population lives, Indigenous women are ten times more likely to be killed compared to the national average, and four times more likely to be sexually assaulted.<sup>17</sup> Homicide is ranked among the leading causes of death for AI/AN women and girls.<sup>18</sup> Partly due to violent crimes, the average life expectancy for AI/AN males on some reservations is less than 50 years, compared to the national average life expectancy for males in the U.S. at

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[Population May Be One of the Hardest to Explain](#), CNN (Aug. 19, 2021, 4:53 PM); see also [ROSAY](#), *supra* note 9, at 44-46 (stating that “[r]elative to non-Hispanic White-only women, American Indian and Alaska Native women are 1.2 times as likely to have experienced violence in their lifetime and are 1.7 times as likely to have experienced violence in the past year (p < .05).” Furthermore, “[r]elative to non-Hispanic White-only men, American Indian and Alaska Native men are 1.3 times as likely to have experienced violence in their lifetime (p < .05).”).

<sup>12</sup> See U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-104045, [MISSING OR MURDERED INDIGENOUS WOMEN: NEW EFFORTS ARE UNDERWAY BUT OPPORTUNITIES EXIST TO IMPROVE THE FEDERAL RESPONSE](#) 23 (2021) [hereinafter USGAO MMIW REPORT]. The United States Government Accountability Office (USGAO) marked different factors that contributed to this lack of data, including underreporting, misclassifications of race, and misclassifications of manner of death. *Id.* The Urban Indian Health Institute offers other factors that contribute to gaps in the data, including historically poor relationships between law enforcement and AI/AN people, poor record keeping, and institutional racism. See URBAN INDIAN HEALTH INST., [MISSING AND MURDERED INDIGENOUS WOMEN & GIRLS](#) 3 (2018) [hereinafter UIHI 2018 REPORT].

<sup>13</sup> See [UIHI 2018 REPORT](#), *supra* note 12.

<sup>14</sup> See [UIHI 2018 REPORT](#), *supra* note 12.

<sup>15</sup> See JOSH ROVNER, THE SENTENCING PROJECT, [DISPARITIES IN TRIBAL YOUTH INCARCERATION](#) (2021), stating that AI/AN youth are more than three times as likely to be detained or committed to juvenile facilities compared to their white peers – a disparity that available data indicate is widening.

<sup>16</sup> See [AMNESTY INT'L](#), *supra* note 3, at 25. Results from the 2010 National Intimate Partner and Sexual Violence Survey by the National Institute of Justice indicate that more than 4 in 5 AI/AN women experienced violence during their lives, a much higher rate than women of other races; “[r]elative to non-Hispanic White-only women, [AI/AN] women are 1.2 times as likely to have experienced violence in their lifetime and are 1.7 times as likely to have experienced violence in the past year.” [ROSAY](#), *supra* note 9, at 43-44 (2016).

<sup>17</sup> See [UIHI 2018 REPORT](#), *supra* note 12, at 3; [Protecting Native American and Alaska Native Women from Violence: November is Native American Heritage Month](#), DEP'T OF JUST.: OFF. ON VIOLENCE AGAINST WOMEN (Nov. 29, 2012); Rebecca A. Hart, [No Exceptions Made: Sexual Assault Against Native American Women and the Denial of Reproductive Services](#), 25 WIS. J. OF L., GENDER & SOC'Y 209, 211-217 (2010); see also Maren Machles et al., [1 In 3 American Indian and Alaska Native Women Will Be Raped, But Survivors Rarely Find Justice on Tribal Lands](#), USA TODAY (last updated Oct. 18, 2019, 9:25 AM) (discussing the disproportionately high rates of sexual assault in Indian Country and its impact on AI/AN women).

<sup>18</sup> [Leading Causes of Death – Females – Non-Hispanic American Indian or Alaska Native - United States 2017](#), CTRES. FOR DISEASE CONTROL AND PREVENTION: HEALTH EQUITY (last modified Nov. 20, 2019).

approximately 75 years.<sup>19</sup> Extractive industries on and near Indigenous lands contribute to this violence faced by AI/AN communities and individuals.<sup>20</sup>

#### A. Inadequate Investigation, Prosecution, and Accountability for Crimes Committed Against Indigenous Persons [Article 6]

Through federal and state agencies, the United States does not act with due diligence to investigate and prosecute crimes committed against Indigenous persons in violation of CERD Article 6.<sup>21</sup> The United States population is 2.9% Indigenous,<sup>22</sup> yet there is a disproportionate number of Indigenous persons who are missing or murdered compared to other demographics. For example, in South Dakota more than 50% of missing persons are Indigenous, despite making up only 8.57% of the state's population.<sup>23</sup> In Wyoming, only 3% of the state's population is Indigenous but 21% of homicide victims were Indigenous from the years 2000 to 2020.<sup>24</sup> Indigenous women in Indian Country are ten times more likely than the national average to be homicide victims, with homicide being the third leading cause of death of AI/AN women.<sup>25</sup> To reduce violence in Indigenous communities and against Indigenous persons, the federal government has implemented several anti-human trafficking initiatives to investigate and prosecute perpetrators.<sup>26</sup> Despite these efforts, human traffickers and other perpetrators of gender-based violence continue to target Indigenous women and girls at disproportionately higher rates compared to other racial and ethnic groups.<sup>27</sup> In its failure to investigate and prosecute these perpetrators, the United States has enabled a continual cycle

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<sup>19</sup> ELIZABETH ARIAS, BETZAIDA TEJADA-VERA & FARIDA AHMAD, [VITAL STATISTICS RAPID RELEASE: PROVISIONAL LIFE EXPECTANCY ESTIMATES FOR JANUARY THROUGH JUNE, 2020](#) 1 (2021) (stating average national life expectancies for males); INDIAN LAW & ORDER COMM'N, [A ROADMAP FOR MAKING NATIVE AMERICA SAFER: REPORT TO THE PRESIDENT & CONGRESS OF THE UNITED STATES](#) 151 (2013) (stating that some tribal leaders estimate “nearly all their children are exposed to violence” and that a 2003 HHS report estimated the Wind River Indian reservation Tribal members had a life expectancy of 40 years).

<sup>20</sup> ANNITA LUCCHESI, SOVEREIGN BODIES INST. & BRAVE HEART SOC'Y, [ZUYA MINYAN WICAYU'ONIHAN: HONORING WARRIOR WOMEN](#) 13-14 (2019). The federal government has not exercised its ability to stop the building of pipelines and take special, concrete measures to prevent extractive industries' ill effects on AI/AN communities and individuals. *Id.*

<sup>21</sup> See [CERD](#), *supra* note 2, art. 6.

<sup>22</sup> See [Nicholas Jones et al.](#), *supra* note 11.

<sup>23</sup> Kirk Siegler, [Human Trafficking Crisis in Indian Country 'Like a Pandemic'](#), NPR, (Mar. 12, 2021) (stating that “of the 109 people currently listed as missing in South Dakota, 77 are believed to be indigenous.”). See [Indian Country](#), U.S. ATT'Y'S OFF.: DIST. OF S.D. (last updated March 24, 2022).

<sup>24</sup> See UNIV. OF WYO.: WYO SURV. & ANALYSIS CTR, [MISSING & MURDERED INDIGENOUS PEOPLE STATEWIDE REPORT WYO](#), 10 (2021).

<sup>25</sup> See Off. of Just. Servs., [Missing and Murdered Indigenous People Crisis: Violence Against Native Americans and Alaska Natives Far Exceed National Averages](#), BUREAU OF INDIAN AFFS. (Nov. 4, 2021).

<sup>26</sup> See, e.g., [Indigenous-led Research on Sex Trafficking among Native Americans in the Northern Great Plains](#), NAT'L INST. OF JUST. (Nov. 4, 2021). In 2021, the National Institute of Justice awarded the University of Nebraska \$1 million to develop a multistakeholder, Indigenous-led, community-based framework for researching the recruiting practices, identification methods, and prevention practices associated with Native American sex trafficking victims in the Great Plains. *Id.* See also Tribal Just. and Safety, [Tribal Consultations & Advisory Groups](#), DEP'T OF JUST, (last updated July 8, 2022); [Native Communities Awareness Poster Series](#), DEP'T OF HOMELAND SEC.: PUBLICATION LIBRARY (last updated July 7, 2022) (stating the Department of Homeland Security created the “Native Communities Awareness Poster Series” to raise awareness for human trafficking. The posters lack substantive information regarding prevention methods or resources available for survivors. Furthermore, the posters take on a paternalistic tone and use phrases such as “Human Trafficking is Not the Native Way” without any context aside from two federal agency phone numbers.)

<sup>27</sup> See Nick Pachelli, Searchlight New Mexico, ['Nobody Saw Me': Why Are So Many Native American Women and Girls Trafficked?](#), THE GUARDIAN (Dec. 18, 2019, 2:00 PM).

of violence against and within Indigenous communities and has denied Indigenous violence victims, survivors, and their families adequate due process.

United States jurisdiction in Indian Country is structurally complex.<sup>28</sup> In 1978, the United States Supreme Court eliminated tribal criminal jurisdiction over non-Indians who commit crimes on tribal lands. Following the Court's decision in *Oliphant v. Suquamish*, violence against Native victims on tribal lands skyrocketed, as the sovereign with the greatest interest in prosecuting crimes perpetrated against Native victims was stripped of power to take action.<sup>29</sup> In response to these elevated levels of crime, in 2013 and again in 2022, Congress recognized inherent tribal authority to investigate and prosecute certain non-Indian crimes against Native victims on tribal lands.<sup>30</sup> Despite these efforts, the federal government refuses to accept tribal courts full authority to prosecute non-native individuals on Indian land,<sup>31</sup> resulting in competing jurisdictions and legal responsibilities that are difficult to navigate, even for trained investigators and prosecutors, let alone the affected Indigenous persons.<sup>32</sup> The United States, as a consequence of its policies, creates legal barriers for Indigenous crime victims to access timely justice and puts Indigenous persons at an increased risk of recurring victimization.<sup>33</sup>

In June 2022, the United States Supreme Court gave states the jurisdiction it had taken away from Tribal Nations in *Oliphant v. Suquamish*.<sup>34</sup> In *Oklahoma v. Castro-Huerta*, the Court held, for the first time in United States history, that it had the authority to grant states criminal jurisdiction over crimes committed on tribal lands, despite the fact that Congress had not authorized such jurisdiction.<sup>35</sup> Taking jurisdiction away from Tribal Nations and giving that jurisdiction to states places Native women and children at risk for increased victimization as, historically, states that have jurisdiction to protect Native victims have failed to dedicate

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<sup>28</sup> See [AMNESTY INT'L](#), *supra* note 3, at 35-49; see also [Tribal Crime and Justice](#), BUREAU OF JUST. STAT. (last visited July 11, 2022) (explaining that “[f]or crimes committed in Indian Country, jurisdiction over criminal justice administration varies by the type and seriousness of the crime, whether the offender or victim is a tribal member, and the location of the offense. Crimes committed in Indian Country among AIANs may be subject to concurrent jurisdiction by tribal, federal, state, or local criminal justice agencies. This is due to the sovereign status of federally recognized tribes and to Public Law 83-280 . . .”).

<sup>29</sup> [Oliphant v. Suquamish Indian Tribe](#), 435 U.S. 191 (1978); AMNESTY INT'L, [MAZE OF INJUSTICE: THE FAILURE TO PROTECT INDIGENOUS WOMEN FROM SEXUAL VIOLENCE IN THE USA](#) 30 (2007).

<sup>30</sup> See 25 U.S.C. § 1304 (2022); see also [Tribal Affairs](#), DEP'T OF JUST: OFF. ON VIOLENCE AGAINST WOMEN (last updated Apr. 5, 2021).

<sup>31</sup> See [UN Committee Calls for Intensified Efforts to Combat Violence Against Native Women](#), INDIAN L. RES. CTR. (Sept. 9, 2014).

<sup>32</sup> See [Tribal Affairs](#), DEP'T OF JUST.: OFF. ON VIOLENCE AGAINST WOMEN, (last updated Apr. 5, 2021); NICOLE MARTINROGERS & VIRGINIA PENDLETON, [MISSING AND MURDERED INDIGENOUS WOMEN TASK FORCE: A REPORT TO THE MINNESOTA LEGISLATURE](#) 91 (Wilder Rsch., 2020) (explaining that “jurisdictional issues may contribute to delays in responding to reports of violence or missing persons, despite the fact that experts know it is critical to the outcome of the case to initiate the investigation as soon as possible after a report of a missing person is received.”). See also Cornelia Perry, [Notes from the Field: Solving Missing Persons Cases in Indian Country](#), NAT'L INST. OF JUST. (Nov. 20, 2019) (Cornelia Perry, a criminal investigator in the Navajo Nation Department of Criminal Investigations, explained that “jurisdictional issues may play a role in how reports are filed.... Currently, there are very few laws that require reporting missing adults, and this may delay investigation. Differing policies and procedures across districts and jurisdictions also make it difficult to determine which cases have been adequately reported and investigated and which require more attention.”).

<sup>33</sup> See [UN Committee Calls for Intensified Efforts to Combat Violence Against Native Women](#), *supra* note 31.

<sup>34</sup> See [Oliphant v. Suquamish Indian Tribe](#), 435 U.S. 191 (1978).

<sup>35</sup> See [Oklahoma v. Castro-Huerta](#), \_\_\_ U.S. \_\_\_ (June 29, 2022).

adequate resources to prevent violence against Native persons.<sup>36</sup> For instance, as early as 1961, Tribal Nations in Nebraska were told that local governments did “not have the funds to maintain station deputy sheriffs on the[ir] reservation[s].”<sup>37</sup> Washington likewise has failed to fund adequately law enforcement on tribal lands, and in 1988, Percy Youckron, Chairman of the Chehalis Business Council, and Robert Joe, Sr., Chairman of the Swinomish Indian Senate, wrote to Senator Bob McCaslin that:

Currently, the state of Washington, through the local county[,] is responsible for [law enforcement services]. Historically this arrangement has not been successful for most reservations; partially due to . . . constrained County law enforcement budgets.<sup>38</sup>

Similarly, Alaska has declined to dedicate sufficient resources to protect Alaska’s Native populations—something tribal leaders in Alaska have repeatedly asked the federal government to address.<sup>39</sup>

As a result of the Court’s recent decision in *Castro-Huerta*, AI/AN persons, particularly women and girls, will further be denied access to justice and suffer. When non-tribal agencies investigate and prosecute MMIP cases, victims and their loved ones face institutionalized doubt and stereotypes<sup>40</sup> rooted in discrimination. Sometimes authorities will not start a missing persons investigation, even though the victim’s loved ones insist that the person is missing.<sup>41</sup> Taking jurisdiction away from Tribal Nations and giving authority to states constitutes a violation of the rights of Indigenous people to be protected by their own tribal governments.

#### B. Inadequate US Federal Government Response to the MMIP Crisis [Article 2(2)]

The US federal government has ignored the MMIP crisis for decades. While it has recently enacted some legislation and policy, the recent laws fail to address the crisis and the government has adopted inadequate policies that are insufficiently funded to deal with the crisis.<sup>42</sup> This attempt to provide AI/AN communities with safety and justice thus far has been

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<sup>36</sup> [United States v. Bryant, 579 U.S. 140, 146](#) (2016) (stating that “[s]tates have not devoted their limited criminal justice resources to crimes committed in Indian Country.”).

<sup>37</sup> U.S. COMM’N ON CIV. RTS., 87TH CONG., [1961 UNITED STATES COMMISSION ON CIVIL RIGHTS REPORT, BOOK 5: JUSTICE](#) 148 (1961).

<sup>38</sup> Letter from Percy Youckton, Chairman Chehalis Business Council, and Robert Joe, Sr., Chairman Swinomish Indian Senate, to Senator Bob McCaslin in support of retrocession of state criminal jurisdiction (Feb. 1, 1988) (on file with Nichusak).

<sup>39</sup> See, e.g., OFF. ON VIOLENCE AGAINST WOMEN, U.S. DEP’T OF JUST., [16TH ANNUAL GOVERNMENT TO GOVERNMENT TRIBAL CONSULTATION: ANNUAL REPORT OF PROCEEDINGS](#) 28 (2021) (testimony of Vivian Korthuis, Chief Executive Officer of the Association of Village Council Presidents) (“Alaska is also a PL-280 state, meaning the federal government . . . transferred that authority to the State. However, State law enforcement is largely absent in our villages.”).

<sup>40</sup> See [USGAO MMIW REPORT](#), *supra* note 12, at 34 (explaining the stereotypes that Indigenous people encounter during interactions with law enforcement). See also [AMNESTY INT’L](#), *supra* note 3, at 56-57 (quoting the Native American Women’s Health Education Resource Center Executive Director Charon Asetoyer as saying “I cannot stress that enough: it makes a difference on depth of an investigation based on the color of your skin.”); Hallie Golden, [‘They Just Didn’t Care’: Families Of Missing Native Women Call Out Indifferent Police](#), THE GUARDIAN (Oct. 15, 2021, 6:00 AM) (explaining ways in which investigators fail to act promptly and without prejudice when handling MMIP cases.).

<sup>41</sup> See [MARTIN ROGERS & PENDLETON](#), *supra* note 32.

<sup>42</sup> USGAO published a report in October 2021, which details the failed implementation of federal policy regarding the MMIP crisis. For the laws that have been passed, statutorily created deadlines have been

insufficient to fulfill the trust responsibility that the federal government voluntarily accepted through signing treaties in exchange for the land the United States received from Tribal Nations. These trust duties, through Constitutional and Congressional interpretation, are to “[e]nsure the survival and welfare”<sup>43</sup> of AI/AN communities.<sup>44</sup>

Although Congress has enacted several laws to address the MMIP crisis, AI/AN continue to experience violence at extremely high and disproportionate rates compared to any other population in the United States.<sup>45</sup> Current legislative remedies do not address barriers to justice, such as federal law enforcement’s routine refusal to investigate homicides of Native people, nor do legislative remedies address the lack of resources to implement these statutes.<sup>46</sup>

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disregarded by the U.S. Department of Justice (DOJ) and Department of the Interior (DOI). [USGAO MMIW REPORT](#), *supra* note 12, at 38-43. There is additionally a lack of funding to enforce federal policy regarding the MMIP crisis. For example, DOJ launched the Tribal Access Program in 2015 to provide tribes access to national crime information systems to address unmet data needs. However, DOJ officials have denied tribes access due to limited funding for the program, “encourag[ing] these tribes to reapply.” *Id.* at 21, 55-60.

<sup>43</sup> AM. INDIAN POL’Y REV. COMM’N, 95TH CONG., [FINAL REP.: VOL. ONE OF TWO VOLS.](#) 130 (Comm. Print 1977) (“The purpose behind the trust is and always has been to insure the survival and welfare of Indian tribes and people. This includes an obligation to provide those services required to protect and enhance Indian lands, resources, and self-government, and also includes those economic and social programs which are necessary to raise the standard of living and social well-being of the Indian people to a level comparable to the non-Indian society.”); see *also* [Seminole Nation v. United States](#), 316 U.S. 286, 296–97 (1942) (“[T]his Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. . . . In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.”).

<sup>44</sup> Historically, in exchange for tribal lands, the US federal government agreed to respect the sovereignty of tribes, to protect the tribes, and to provide for their wellbeing. These agreements result in a fiduciary obligation that the federal government has assigned itself. Through treaties, laws, Supreme Court decisions, and Executive Orders, it has been established that tribal sovereign entities are entitled to different federal services such as education, housing, and healthcare, as well as civil rights protections. Enforcing a trust duty owed by the federal government requires identifying a statutory source that contains the specific duty. See [Cherokee Nation v. Georgia](#), 30 U.S. 1 (1831); [Seminole Nation v. United States](#), 316 U.S. 286 (1942) (where the Supreme Court has acknowledged the federal government’s legally enforceable fiduciary responsibility to tribes). *But see* [43 U.S.C. § 1603](#). Under the Alaska Native Claims Settlement Act, Alaska Native Corporations hold title to Indigenous land, rather than the federal government in trust. Because of this, policy that applies to Indian Country does not apply to Alaska. Alaska Native communities are unable to benefit from most of the federal policymaking mentioned in this submission that address the MMIP crisis. [AMNESTY INT’L](#), *supra* note 3, at 49.

<sup>45</sup> [ROSAY](#), *supra* note 9, at 43-44; See SOVEREIGN BODIES INST., [“THEY FAILED TO PROTECT ME”: ENHANCING RESPONSE TO AND SURVEILLANCE OF DOMESTIC & INTIMATE PARTNER VIOLENCE AND MISSING AND MURDERED INDIGENOUS WOMEN, GIRLS, AND TWO SPIRIT PEOPLE OF CALIFORNIA DURING THE COVID-19 PANDEMIC](#) 33-34 (2021); SOVEREIGN BODIES INST., [TO’ KEE SKUY’ SOO NEY-WO-CHEK’: YEAR 2 PROGRESS REPORT - JULY 2021](#) 48-49, 51 (2021); NATIVE AMERICAN BUDGET POL’Y INST., [NEW MEXICO MISSING AND MURDERED INDIGENOUS WOMEN AND RELATIVES TASK FORCE REPORT](#) 20, 24 (2020); [MARTIN ROGERS & PENDLETON](#), *supra* note 32, at 15; MATTHEW SUTTER ET AL., [LB154 REPORT: PREVALENCE OF MISSING NATIVE AMERICAN WOMEN AND CHILDREN IN NEBRASKA; BARRIERS TO REPORTING AND INVESTIGATING; AND OPPORTUNITIES FOR PARTNERSHIPS](#) 3, 15 (2020) (reports conducted by private organizations in different states which indicate the statistics regarding violence against Indigenous peoples in the US in the 2016 NIJ study remain just as high six years later).

<sup>46</sup> The 2022 reauthorizations of the Violence Against Women Act (VAWA) offer tribes increased jurisdiction over sexual crimes committed by non-Native perpetrators, but do not provide adequate funding for tribes to exercise this jurisdiction. [Consolidated Appropriations Act of 2022](#), PUB. L. No. 117-103,

Savanna's Act<sup>47</sup> and the Not Invisible Act,<sup>48</sup> for instance, are two complementary pieces of legislation that aim to increase data collection around the MMIP crisis, with negligible results as they have not been implemented properly or monitored for effectiveness.<sup>49</sup> Nor do they even attempt to address the root causes of the crisis—which is the fact that the United States Supreme Court stripped Tribal Nations of their inherent right to protect Native victims in their own homes and communities. Neither Act requires the United States Attorney's Office to prosecute individuals who murder Native people on tribal lands, and United States Attorneys continue to refuse to do so. The Family Violence Prevention and Services Act mandates that tribal governments receive at least 10% of annual appropriation of funds for domestic violence supportive services.<sup>50</sup> Despite this allocation, more than half tribal governments do not have access to these funds or services.<sup>51</sup> While the Executive branch of the US government is attempting to remedy historical inaction to address violence against AI/AN people, actual progress is unclear.<sup>52</sup>

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Division W—Violence Against Women Act Reauthorization Act of 2022, sec. 804, 131 Stat. 51, 898-904 (codified as amended at [25 U.S.C. 1304](#)). Some tribal governments, including most Alaska Native villages, do not have this increased jurisdiction. Some tribes with access to this increased jurisdiction lack adequate funding to exercise it. The funding comes from an initial three-year grant, with no guarantee for future funding. The action required to take advantage of this increased jurisdictional authority is cost-prohibitive for many tribes. [AMNESTY INT'L](#), *supra* note 3, at 43-45.

<sup>47</sup> [Savanna's Act](#), Pub. L. No. 116-165, 134 Stat. 760 (2020).

<sup>48</sup> [Not Invisible Act of 2019](#), Pub. L. No. 116-166, 134 Stat. 766 (2020).

<sup>49</sup> For example, the Commission on Reducing Violent Crime Against Indians, which is required by the Not Invisible Act of 2019, was formed on May 5, 2022, almost two years after the ratification of the Act. See Kerri Colfer, [2022 Legislative Update: Reforms and Increased Resources to Remove Barriers to Safety and Justice for Native Women](#), 19.2 RESTORATION OF NATIVE SOVEREIGNTY AND SAFETY FOR NATIVE WOMEN 31 (June 2022). The USGAO MMIW Report found that a major factor in the ongoing MMIP crisis is existing federal law not being implemented properly. While there is legislation in place to address the MMIP crisis, deadlines within these statutes are ignored, and the laws are not implemented. USGAO recommends the implementation of existing laws, and to develop plans with milestone dates so that statutory deadlines are adhered to. The report states that this “would help guard against further delays and better position the agencies to achieve their missions by implementing the unfulfilled requirements . . .” [USGAO MMIW REPORT](#), *supra* note 12, at 45. The Commission on Reducing Violent Crime Against Indians was formed on May 5, 2022, almost two years after the ratification of the Not Invisible Act.

<sup>50</sup> [42 USCS §§ 10403\(2\)\(B\), 10409\(a\)](#).

<sup>51</sup> Family Violence Prevention & Services Program, [FY 2021 FVPSA ARP Supplemental Grant Award Allocations for Tribes](#) (2021) (296 tribes and tribal organizations received funding in FY 2021, while there are 574 federally recognized tribes in the US); Family Violence Prevention & Services Program, Tribal Domestic Violence Services, [Overview of Family Violence Prevention and Services Act Funding](#) (2018). See Paula Julian, [Family Violence and Prevention Services Act 2021 Reauthorization: Tribal Consultation Confirms Urgent Need to Increase Funding for Shelter and Services](#), RESTORATION OF NATIVE SOVEREIGNTY AND SAFETY FOR NATIVE WOMEN 52-53 (Oct. 2021) (indicating the current funding is not sufficient to provide services for AI/AN survivors of domestic violence, and suggesting a 12.5% allocation of FVPSA funds instead).

<sup>52</sup> See [Exec. Order No. 13898](#), 84 C.F.R. § 66059 (2019). Known as Operation Lady Justice, this task force conducted listening sessions with tribal leaders and communities and attempted to improve law enforcement response to MMIP cases. *Id.* See also [Exec. Order No. 14053](#), 86 C.F.R. § 64337 (2021). Executive Order 14053 builds upon work begun by Operation Lady Justice, and includes the tasks required by Savanna's Act and the Not Invisible Act. The Not Invisible Act Joint Commission on Reducing Violent Crime Against Indians created under this E.O. has assumed the work of Operation Lady Justice. It is unclear what progress has been made on this project, but the deadline for the Attorney General and the Secretary of the Interior to report to President Biden on the strategies outlined in the E.O. is on July 15, 2022. [Exec. Order No. 14053](#), *supra*.

Despite legislative and executive action, many AI/AN victims and their families are still left without access to justice.<sup>53</sup> Previous federal government action, such as the passage of Public Law 280<sup>54</sup> and the Supreme Court's decision in *Oliphant*,<sup>55</sup> has limited how tribal governments can respond to acts of violence. Additionally, the United States fails to address the needs of AI/AN persons who live outside of Indian Country. AI/AN persons who reside in urban centers disproportionately experience violence and lack access to justice as well. The United States must do more to ensure that all Native persons, regardless of geography, are not targets of violence and discrimination.<sup>56</sup>

Many of these policy and legislative actions lack adequate funding, which adds to their inability to address the MMIP crisis.<sup>57</sup> The U.S. Commission on Civil Rights has determined that the funding allocated for services critical to AI/AN communities is disproportionately lower than funding for these same services to other groups.<sup>58</sup> Without proper funding, federal agencies and tribal governments cannot implement the measures intended to address the

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<sup>53</sup> [AMNESTY INT'L](#), *supra* note 3, at 9. "The USA has formed a complex interrelation between federal, state and tribal jurisdictions that undermines tribal authority and allows perpetrators of violence against AI/AN women to evade justice." *Id.*

<sup>54</sup> Public Law 280 (P.L. 280) transferred criminal and civil jurisdiction from the federal government to certain state governments. In effect, this law gives tribal and state law enforcement concurrent jurisdiction, which complicates the response to MMIP cases. Additionally, Congress has not allocated any additional funds to P.L. 280 states, meaning there are not sufficient resources for state authorities to adequately take on these obligations. [Public Law 280](#), Pub. L. No. 83-280, 67 Stat. 588 (codified at 18 U.S.C. § 1162, 28 U.S.C. § 1360, 25 U.S.C. §§ 1321–1326).

<sup>55</sup> The Supreme Court's *Oliphant* ruling stripped tribal governments of authority to prosecute crimes of sexual violence by non-Native offenders on tribal lands. See *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 210 (1978) ("By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress."). The National Institute of Justice's National Baseline Study found that out of the AI/AN women who have experienced sexual violence in their lifetime, 96% of them experienced sexual violence by a non-Native perpetrator. [ROSAY](#), *supra* note 9, at 19. VAWA reauthorizations have rolled back some of these limitations, but the persisting lack of tribal jurisdiction deprives victims of the equal protection of the law. [ROSAY](#), *supra* note 9, at 47.

<sup>56</sup> See [UIHI 2018 REPORT](#), *supra* note 12, at 3 ("Though there are critical issues regarding jurisdiction of [MMIP] cases on reservation and village lands, lack of prosecution, lack of proper data collection, prejudice, and institutional racism are factors that also occur in urban areas."). See also [NATIVE AMERICAN BUDGET POL'Y INST.](#), *supra* note 45, at 12, 14 (2020) (acknowledging urban AI/AN victims of violence, and also discussing the lack of data on MMIP cases in urban areas); See [MARTIN ROGERS & PENDLETON](#) *supra* note 32, at 81. (addressing problems of jurisdiction that appear in both rural and urban MMIP cases); [MATTHEW SUTTER ET AL.](#), *supra* note 45 at 24 (citing the unique challenges and needs AI/AN individuals have in urban settings); [ROVNER, THE SENTENCING PROJECT](#), *supra* note 15 (detailing the disproportionate amount of Native youth in the juvenile detention system).

<sup>57</sup> See [BROKEN PROMISES](#), *supra* note 3, at 4; see also U.S. COMM'N ON CIV. RTS., [A QUIET CRISIS: FEDERAL FUNDING AND UNMET NEEDS IN INDIAN COUNTRY](#) 5-6 (2003) (illustrating the continual underfunding of special and concrete measures taken to improve the well-being of Native people in the United States) [hereinafter A QUIET CRISIS]. See also [BROKEN PROMISES](#), *supra* note 3, at 4. The United States Commission on Civil Rights published BROKEN PROMISES in 2018 to examine Congress' failure in the years after A QUIET CRISIS to fully fund the treaty and statutory obligations the federal government has voluntarily accepted. [BROKEN PROMISES](#), *supra* note 3, at 2 ("Since 2003, funding for Native American programs has mostly remained flat, and in the few cases where there have been increases, they have barely kept up with inflation or have actually resulted in decreased spending power."). See Comm. on the Elimination of Racial Discrimination, [Combined Tenth to Twelfth Periodic Reports Submitted by the United States Of America Under Article 9 of the International Convention On The Elimination Of All Forms Of Racial Discrimination](#), U.N. Doc. CERD/C/USA/10-12, ¶¶ 103-04 (Dec. 20, 2021), which do not address this underfunding.

<sup>58</sup> [USGAO MMIW REPORT](#), *supra* note 12, at 17.

MMIP crisis.<sup>59</sup> The insufficiency of funds follows the Federal government's historical pattern of discrimination against Native peoples.

### C. Inadequate Data Collection, Disaggregation, and Access [Article 5(e)(iv)]

The United States' ineffective response to prevent and to provide adequate remedy to victims of the MMIP crisis has caused Indigenous women, girls, two-spirit, and gender diverse individuals to “disappear not once, but three times—in life, in the media, and in the data.”<sup>60</sup> Absent comprehensive, accurate, and accessible data, the government cannot adequately address the impact of the MMIP crisis on Indigenous communities and persons. The United States, due to its flawed data-collection methods, cannot even fully understand the extent of the violence and destruction the MMIP crisis has inflicted on AI/AN persons.

Though legislation has been passed to improve its data collection practices, the federal government still does not collect data regarding the MMIP crisis on a consistent basis.<sup>61</sup> The total number of missing and murdered Indigenous persons in the United States is unknown.<sup>62</sup> For the data that do exist, the vast majority of these data only contain information on Indian Country.<sup>63</sup> Current research ignores the violence AI/AN people face in other settings and fails to produce representative samples for accurate analysis.<sup>64</sup> To adequately address the MMIP crisis, governments at all levels (federal, state, tribal, etc.) need access to data to make informed policy and resource allocation choices.<sup>65</sup> The existing gaps in the data further limit the governmental response and make it difficult to determine what progress, if any, has been made to address the MMIP crisis across the United States.

The United States government has conducted research and published reports that seek to identify issues affecting Indigenous populations, but the data often remain inaccessible.<sup>66</sup> Instead, civil society attempts to collect and share data from its own reports to

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<sup>59</sup> See [AMNESTY INT'L](#), *supra* note 3, at 11. Total funding for US Attorney's Offices in Indian Country, as well as the number of attorneys responsible for prosecutions in Indian Country, has decreased by forty percent since 2013. The available data indicates these underfunded offices decline to prosecute many sex crimes in Indian Country. *Id.*

<sup>60</sup> [UIHI 2018 REPORT](#), *supra* note 12, at 2; see also Naomi Ishisaka, [Contrasting coverage of Gabby Petito case and missing and murdered Indigenous people shows 'absolute injustice'](#), THE SEATTLE TIMES (Sep. 27, 2021, 5:47 PM) (highlighting the disparity in American media coverage of MMIP cases and cases involving white women); Katie Robertson, [News Media Can't Shake 'Missing White Woman Syndrome,' Critics Say](#), THE NEW YORK TIMES (last updated Sep. 30, 2021).

<sup>61</sup> See [AMNESTY INT'L](#), *supra* note 3, at 20-21, which details the uncoordinated efforts of the federal government to document violence against AI/AN persons.

<sup>62</sup> USGAO marked different factors that contributed to this lack of data. These factors included underreporting, misclassifications of race, and misclassifications of manner of death. [USGAO MMIW REPORT](#), *supra* note 12, at 27. In its report, The Urban Indian Health Institute offers other factors that contribute to gaps in the data, including historically poor relationships between law enforcement and AI/AN people, poor record keeping, and institutional racism. [UIHI 2018 REPORT](#), *supra* note 12, at 3.

<sup>63</sup> The first nationally representative study of violence against AI/AN women only focused on AI/AN women living in Indian Country or Alaska Native villages. Comm. on the Elimination of Racial Discrimination, [Combined Tenth to Twelfth Periodic Reports Submitted by the United States Of America Under Article 9 of the International Convention On The Elimination Of All Forms Of Racial Discrimination](#), U.N. Doc. CERD/C/USA/10-12, ¶ 101 (Dec. 20, 2021).

<sup>64</sup> [UIHI 2018 REPORT](#), *supra* note 12, at 2; See also [AMNESTY INT'L](#), *supra* note 3, at 21.

<sup>65</sup> [A QUIET CRISIS](#), *supra* note 57, at 6.

<sup>66</sup> The National Missing and Unidentified Persons System publishes monthly reports, including reports specifically for American Indian and Alaska Native Case Statistics and Tribal Cases. [Monthly NamUs Case Reports](#), NAMUS: REPORTS & STATISTICS, (last visited July 11, 2022). The most recent report, April 2022, stated that there were 770 AI/AN missing persons cases nationwide with 290 of those cases being in Alaska. See

fill in the gaps in data collection.<sup>67</sup> Even when tribal communities are notified of the reports, they may lack the technology<sup>68</sup> and broadband Internet<sup>69</sup> required to access the data. Through the Tribal Access Program (TAP), the United States purports to make data and statistics available to tribes.<sup>70</sup> In practice, the United States government acts as a gatekeeper that prevents tribes from accessing critical databases. The United States creates roadblocks in the investigatory and prosecutorial processes by requiring tribes to opt in to TAP instead of automatically granting tribal authorities access to the databases.<sup>71</sup> Non-federally recognized tribes are barred from applying to TAP.<sup>72</sup> Without access to data, tribes face difficulties with implementing measures to address effectively the MMIP crisis. The United States has failed to comply with obligations set out in the CERD by not providing tribes full and direct access to complete and disaggregated data on MMIP.

### III. Recommended Questions

Nichusak recommends that the Committee pose the following questions to the United States Government:

Q.1: What concrete steps will the United States take to restore tribal sovereignty and ensure that all tribal governments are well-resourced and can fully protect members from violent crimes? What concrete steps will the United States take to address the disproportionately high rates of violent crimes committed against AI/AN women and girls?

Q.2: What concrete steps will the United States take to ensure that non-tribal law enforcement will investigate thoroughly and promptly crimes committed against Indigenous persons? What concrete steps will federal prosecutors take to ensure that United States Attorneys will prosecute thoroughly, promptly, and without discrimination crimes committed against Indigenous persons?

Q.3: What concrete steps will the United States take to ensure that data representing Indigenous persons are complete and accurate, and are collected in consultation with tribes? What concrete steps will the United States take to ensure that the data collected accurately reflects AI/AN populations that reside both in and outside of Indian Country?

Q.4: What concrete steps will the United States take to ensure that existing policy addressing the MMIP crisis is fully funded and implemented? What concrete steps will the United States take to monitor the progress of government initiatives and how will

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generally NAT'L MISSING & UNIDENTIFIED PERS. SYS., [American Indian/Alaska Native Missing Persons Cases April 2022](#) (2022).

<sup>67</sup> See URBAN INDIAN HEALTH INSTITUTE, [MMIWG: WE DEMAND MORE](#) 6 (2019).

<sup>68</sup> See U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-682, [TRIBAL BROADBAND: FEW PARTNERSHIPS EXIST AND THE RURAL UTILITIES SERVICE NEEDS TO IDENTIFY AND ADDRESS ANY FUNDING BARRIERS TRIBES FACE](#) 1-4 (2018); see also [Digital Divide](#), ARIZ. STATE UNIV. AM. INDIAN POL'Y INST. (last visited July 11, 2022).

<sup>69</sup> See U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-630, [BROADBAND INTERNET: FCC'S DATA OVERSTATE ACCESS ON TRIBAL LANDS](#) 1-3 (2018).

<sup>70</sup> See generally [Tribal Access Program \(TAP\)](#), DEP'T OF JUST.: TRIBAL JUST. & SAFETY, (last visited July 11, 2022).

<sup>71</sup> See [Tribal Access Program \(TAP\)](#), *supra* note 70 ("There are currently 108 Tribes with over 450 tribal government agencies participating in TAP.").

<sup>72</sup> As of 2012, approximately 400 tribes within the United States are not federally recognized. This creates a barrier for Indigenous communities. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-348, [INDIAN ISSUES: FEDERAL FUNDING FOR NON-FEDERALLY RECOGNIZED TRIBES](#) 1-3 (2012).

the U.S. incorporate feedback from Indigenous communities to ensure effectiveness of such initiatives?

#### **IV. Suggested Recommendations to the United States**

Nichusak recommends that the Committee advise the United States Government to adopt the following recommendations:

R.1: The US federal government must honor its trust relationship with tribal governments and AI/AN people by fully funding tribal governments and implementing the existing statutes and policies that address the MMIP crisis in consultation with tribes. The United States must support and recognize tribal sovereignty and the right of Tribal Nations to self-determination.

R.2: Collect and compile comprehensive data and include Indigenous people who do not reside in Indian Country. Ensure that Indigenous community's leaders and members have access to the reports and are consulted during the data-collection process. Negotiate data sovereignty agreements with the free, prior, and informed consent of the tribes.

R.3: Provide more financial resources and administrative support to tribal investigatory, prosecutorial, and judicial bodies. Federal authorities, such as the FBI, must conduct thorough investigations of crimes committed against Indigenous persons that occur within federal jurisdiction. Federal prosecutors, such as United States Attorneys, must promptly and thoroughly pursue cases against perpetrators who commit crimes within federal jurisdiction. Investigators and prosecutors must treat victims and their families with respect and dignity and keep them apprised of case updates in a timely manner.

Dated: 14 July 2022