Treaties, Tribal Courts, and Jurisdiction: The Treaty of Canandaigua and the Six Nations' Sovereign Right to Exercise Criminal Jurisdiction

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I. Introduction

Since the United States Supreme Court's refusal to recognize Indian nations' sovereign right to exercise criminal jurisdiction in 1978, Indian nations have worked to regain recognition of this right. In 1978, in *Oliphant v. Suquamish Indian Tribe*,[1] a non-Indian challenged the Suquamish Indian Tribe's sovereign right to exercise criminal jurisdiction over him.[2] The Court found that inherent tribal powers could be explicitly and implicitly divested, if these powers were inconsistent with their status as domestic dependent nations.[3] The Court stated, "By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try

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1. 435 U.S. 191 (1978).
2. *Id.* at 194.
3. *Id.* at 208-09.

non-Indian citizens of the United States except in a manner acceptable to Congress."[4] Drawing a "protective cloak" of United States citizenship around *Oliphant*,[5] the Court found Indian nations were implicitly divested of the power to exercise criminal jurisdiction over non-Indians.[6] The Court did acknowledge, however, that an Indian nation possesses criminal jurisdiction over non-Indians if the Indian nation has a treaty to that effect.[7]

In 1990, in *Duro v. Reina*,[8] the U.S. Supreme Court held that the Salt River Pima-Maricopa Indian Community could not assert criminal jurisdiction over a non-member Indian.[9] The Court held that tribal authority did not extend beyond internal relations among members.[10] The Court expressed particular concern about the tribal court exercising criminal jurisdiction over a person who was not a member, was not eligible to become a member, and could not vote, hold office, or serve on a jury within the tribal community.[11] Congress quickly reversed *Duro* through an amendment to the Indian Civil Rights Act, commonly known as the "*Duro* fix," thereby acknowledging tribal courts' criminal jurisdiction over non-member Indians.[12]

The United States government's refusal to acknowledge the full extent of an Indian nation's sovereign powers does not stop the practical day-to-day problems of crime in Indian country. Focusing only on sexual assault, American Indian and Alaska Native women are about 2.5 times more likely to be raped or sexually assaulted than women in general.[13] And 34.1 percent of American Indian and Alaska Native women will be raped in their lifetime, while the rate for white women is 17.7 percent.[14] Indian victims of violent crime indicate that over 66

4. *Id.* at 210.
5. *See* N. BRUCE DUTHU, AMERICAN INDIANS AND THE LAW 22 (2008).
6. *Oliphant*, 435 U.S. at 212.
7. *Id.* at 197.
8. 495 U.S. 676 (1990).
9. *Id.* at 679.
10. *Id.* at 685.
11. *Id.* at 688.
12. *See* 25 U.S.C. § 1301(2) (2006).
13. *See* STEVEN W. PERRY, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME: A BJS STATISTICAL PROFILE, 1992-2002 5 (2004), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/aic02.pdf.
14. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 22 (2000), *available at* http://www.ncjrs.gov/pdffiles1/nij/183781.pdf.

percent of these crimes are committed by non-Indian offenders.[15] And in crimes involving Indian victims, the offender is more likely to be a stranger.[16] Although national data often does not capture the crime rate within each Indian Territory, the Bureau of Justice Statistics illustrate, through three victimization surveys in different Indian nations, the prevalence of crime on Indian territories.[17] Each survey only captured a small amount of the tribal population and the surveys do not afford generalizations, but it is critical to note in one community 88 percent of survey participants report being victims of violent crime; 33 percent in another territory; and 25 percent in the third.[18] Critically, "[c]rime against American Indians nationwide seems to have risen dramatically even as Congress has steadily expanded the substantive scope of the Major Crimes Act."[19] Furthermore:

> [T]he crime rate seems worst in precisely the areas in which the federal government has been most aggressive. For example, despite the federal government's extensive expansion of jurisdiction over Indian country sex crimes in the Major Crimes Act in 1986, the Department of Justice's own study in the mid-1990s showed that Indian children under twelve are raped or sexually assaulted at a rate three-and-a-half times higher than the average child under age of twelve.[20]

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15. PERRY, *supra* note 13, at 9.
16. *Id.* at 8.
17. *See generally id.*
18. *See id.* at 33-40.
19. Kevin K. Washburn, *Federal Criminal Law and Tribal Self-Determination*, 84 N.C. L. REV. 779, 828-29 (2006). The Major Crimes Act, ch. 341, § 9, 23 Stat. 385 (1885) (current version at 18 U.S.C. § 1153 (2006)), was enacted in 1885 by Congress in response to the U.S. Supreme Court's ruling in *Ex parte Crow Dog*, 109 U.S. 556 (1883), that in the absence of a federal statute limiting tribal court jurisdiction, Indian nations possessed exclusive criminal jurisdiction. *Id.* at 571. The Major Crimes Act was the first assertion of federal criminal jurisdiction in Indian country and was a response to a false perception of lawlessness in Indian country as the Bureau of Indian Affairs and other officials did not understand tribal dispute resolution and wanted federal jurisdiction as a mechanism to assert control on Indian territories. *See* CARRIE E. GARROW & SARAH DEER, TRIBAL CRIMINAL LAW AND PROCEDURE 87 (2004). The Major Crimes Act does not remove jurisdiction from Indian nations, but rather grants federal courts concurrent jurisdiction over a list of designated offenses. *See id.*
20. Washburn, *supra* note 19, at 829 (citing LAWRENCE A. GREENFELD & STEVEN K. SMITH, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, AMERICAN INDIANS AND CRIME 38 (1999), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/aic.pdf). Washburn notes that from 1992 to 1996, "Indian children under twelve were raped or sexually assaulted at a rate of seven incidents per thousand children" compared to children of all races, who experienced "two rapes or sexual assaults per thousand children." Washburn, *supra* note 19, at 829 n.227.

The statistical data illustrate that crime by non-Indians against Indians is a serious problem that must be addressed to protect Indian people and nations.

The federal government's refusal to recognize the jurisdiction of tribal courts over non-Indians has left Indian people vulnerable to serious crimes. This vulnerability is further exacerbated by the fact that non-Indian offenders often go unprosecuted by the federal government.[21] United States attorneys "have been widely criticized for decades for failing to give proper attention to Indian country cases."[22] This may be a result of the "non-reviewability of the decision to decline prosecution [along with] the weak . . . political accountability of federal prosecutors to Indian communities, and the lack of media interest in Indian country . . . ."[23] Indian nations, and particularly tribal court judges, must find other ways to exercise jurisdiction over non-Indians in order to achieve justice for the numerous victims within Indian country. While many individuals and nations are working to convince Congress to provide a legislative fix[24] that restores recognition of tribal court criminal jurisdiction over non-Indians, some tribal courts are looking for other solutions.

One of the tools that tribal courts have begun to employ is their inherent authority to exercise jurisdiction over people within their territories, as recognized by treaties between Indian nations and the United States.[25] This inherent authority is a critical source of jurisdiction that all tribal court judges and advo-

21. Washburn, *supra* note 19, at 818 n.225.

22. Kevin K. Washburn, *American Indians, Crime, and the Law*, 104 MICH. L. REV. 709, 733 (2006).

23. *Id.*

24. Indian country advocates are working with Senator Byron Dorgan on the Tribal Law & Order Act of 2009, S. 797, 111th Cong. (as reported by S. Comm. on Indian Affairs, Sept. 10, 2009). Many advocates have argued for language that reverses *Oliphant* and restores recognition of criminal jurisdiction over non-Indians. Other options have included a legislative fix that would allow Indian nations to petition the federal government for this recognition or enter into a compact with state and federal governments regarding restoration of criminal jurisdiction. The current bill does not include a legislative fix. However, there is also some discussion that Congress may sponsor a pilot project with one or two nations. Domestic violence advocates that have worked with Congress on the Violence Against Women Act are also advocating restoration of criminal jurisdiction over non-Indians, as many domestic violence offenders are non-Indians.

25. *See, e.g.*, Means v. Dist. Court of the Chinle Judicial Dist., No. SC-CV-61-98, 1999 NANN 0000013 (Navajo May 11, 1999) (VersusLaw).

cates should use to ensure that Indian nations are able to exercise the full measure of their authority over non-Indians. If Indian nations neglect to invoke their inherent power, recognized by treaties with the United States, the treaties will become simply old and irrelevant documents rather than living documents that recognize and affirm Indian nations' inherent authority as sovereign nations. Moreover, as a source of law recognized by the U.S. Constitution as the "supreme law of the land,"[26] treaties are a defense to jurisdictional attacks by state and federal governments. Even the *Oliphant* Court recognized treaties as a source of jurisdiction over non-Indians.[27]

Treaties provide protection against further federal interference with the rights of Indian people and are legal tools needed to exercise the sovereignty of Indian nations. As Indian nations begin to rely upon their inherent authority and treaties, tribal courts will be able to more consistently exercise jurisdiction based upon tribal laws rather than the laws of foreign nations interpreting Indian nations' jurisdictional powers. Critically, courts will be better able to protect victims of crime, which in turn strengthens Indian nations—victims receive indigenous justice, are healed, and are empowered to contribute to their nations. Where the Western criminal justice system has not been successful in rehabilitating offenders, tribal justice increases the likelihood of restoring Indian and non-Indian offenders who live in or contribute to the Indian community to a healthy way of life.[28]

This article explores the potential uses of Indian nations' inherent authority and treaties to exercise criminal jurisdiction over non-Indian offenders. It first examines several Navajo Nation Supreme Court opinions to highlight the use of Navajo law and treaties as bases for criminal jurisdiction.[29] Next, Haudenosaunee[30] law and the Canandaigua Treaty of 1794[31] are ex-

26. *See* U.S. CONST. art VI.
27. 435 U.S. 191, 195 n.6 (1978).
28. *See* GARROW & DEER, *supra* note 19, at 394-99.
29. *See infra* text accompanying notes 39-62.
30. The Haudenosaunee consist of the Mohawk, Seneca, Oneida, Cayuga, Onondaga, and Tuscarora Nations. They also are known as the Iroquois or Six Nations Confederacy.
31. Canandaigua Treaty of 1794, U.S.-Six Nations, Nov. 11, 1794, 7 Stat. 44, *available at* http://www.cayuganation-nsn.gov/Home/LandRights/Treaties/TreatyofCanandaigua [hereinafter Canandaigua Treaty].

amined to determine whether they provide similar grounds for asserting criminal jurisdiction over non-Indians.[32] Finally, suggestions for tribal court judges and tribal court practitioners are provided to encourage the use of tribal law and treaties as a basis for tribal court jurisdiction.[33]

II. Treaties and Tribal Courts

When a tribal court is confronted with jurisdictional issues, it is imperative that the court examine its inherent jurisdictional authority as defined by tribal laws and recognized by the nation's treaties. Many Indian scholars and attorneys first examine the federal government's interpretation of tribal jurisdiction, ignoring the tribe's own laws. Seneca legal scholar and practitioner, Robert Odawi Porter, notes that in doing so, they have "failed to properly frame the nature of the inquiry."[34] If judges and advocates look first and only to federal Indian law and fail to use tribal law as a basis for jurisdiction, they "concede far too much authority to the United States at the expense of the Indian nations and their inherent sovereignty."[35] In addition to examining tribal law, we also must look to the nation's treaties which recognize the inherent authority of tribal laws.

Indian nations' inherent sovereignty, or the freedom and right of all peoples to determine their destiny as a nation, recognized in treaties serves as evidence of the federal government's acknowledgement of Indian nations' sovereign status and ability to exercise power over those within their borders.[36] Treaties were formulated at a time in history when European nations and the fledgling United States respected Indian nations' sovereign status and military power, and sought to make treaties as a mechanism for preserving peace.[37] Or as Porter states, "[t]he existence of treaties between Indian nations and the colonists should be viewed as conclusive evidence of Indigenous state-

32. *See infra* Part III.

33. *See infra* Part IV.

34. Robert Odawi Porter, *The Inapplicability of American Law to the Indian Nations*, 89 IOWA L. REV. 1595, 1597 (2004).

35. *Id.* at 1598.

36. *See id.* at 1601. *See generally* Siegfried Wiessner, *American Indian Treaties and Modern International Law*, 7 ST. THOMAS L. REV. 567 (1995).

37. *See* Porter, *supra* note 34, at 1600.

hood,"[38] as treaties are only used by sovereign nations in recognition of each other's statehood.

Thus, when faced with a jurisdictional question, judges and practitioners should engage in at least a two-step process of examining: (1) tribal laws, both written and oral; and (2) any treaties that may acknowledge the nation's inherent authority as a sovereign. The Navajo Nation Supreme Court's decision in *Manygoats v. Cameron Trading Post*[39] is instructive. In *Manygoats*, the court acknowledged that in addressing a jurisdictional question, the court must first examine its own inherent authority, which is found in Navajo laws. Then, it must examine any applicable treaties. Only after this analysis could the court consider any jurisdiction that the federal government may have granted the Navajo Nation:

> [W]e will now address the question of whether the Navajo Nation has civil regulatory and adjudicatory jurisdiction over the employment practices of a New Mexico corporation conducting business on fee land within the territory of the Navajo Nation. However, prior to proceeding to the contemporary Indian affairs law rules on civil jurisdiction over non-Indians, we will first apply the Treaty of 1868 between the United States of America and the Navajo Nation. We do so because there are three foundations for jurisdiction in Indian law cases. Our jurisdiction comes from (1) the inherent authority of the Navajo Nation as an Indian nation, (2) the Navajo Nation's treaties with the United States of America, and (3) federal statutes which vest jurisdiction in the Navajo Nation. We address the treaty issue first, because a treaty constitutes the United States' recognition of our jurisdiction.[40]

The question of tribal court jurisdiction often turns on the political status of the defendant—is he a citizen of the Indian nation, a non-member Indian, or a non-Indian? The answer to this question often lies in the nation's inherent authority, found within its own laws. If United States law challenges this result—as seen in *Oliphant*—the analysis then turns to the nation's treaties to determine if the United States has previously acknowledged the exercise of jurisdiction. For example, the Navajo Nation Supreme Court often relies upon its common law and the treaties made between the United States and the

38. *Id.* at 1601.

39. No. SC-CV-50-98, 2000 NANN 0000003 (Navajo Jan. 14, 2000) (VersusLaw).

40. *Id.* at ¶ 40 (citation omitted).

Navajo Nation when addressing jurisdictional questions.[41] The Treaty of 1868 sets out a boundary description and then states "this reservation" is "set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them."[42] The Navajo Nation Supreme Court explains that this plain language means that the Navajo Reservation exists not only for the Navajos, but other Indians,[43] an acknowledgement by the U.S. government of the Navajo Nation's inherent right to exercise jurisdiction. More importantly, the court relies upon this acknowledgement of its jurisdiction over non-member Indians rather than relying upon federal Indian law's interpretation of their jurisdiction.

A similar result is seen in the Navajo Nation Supreme Court decision in *Billie v. Abbott*,[44] which used the Treaty of 1868 as a basis for holding that the United States' Aid to Families of Dependent Children legislation does not divest the Navajo Nation of its exclusive power to decide the child support obligations of its members who live on the Reservation:

> Implicit in the Treaty of 1868 is the understanding that the internal affairs of the Navajo people are within the exclusive jurisdiction of the Navajo Nation government. And, since the signing of the Navajo treaty, Congress has consistently acted upon the assumption that the States lacked jurisdiction over Navajos living on the reservation. The sovereignty retained by an Indian tribe includes the power of regulating [its] internal and social relations. Because Navajo domestic relations is [sic] the core of the tribe's internal and social relations, the Navajo Nation has exclusive power over domestic relations among Navajos living on the reservation.[45]

As a result, the court concluded that it had jurisdiction over a Utah official who had seized a tribal member's federal income tax to repay the state for child support.[46]

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41. *See, e.g.*, *id.*; Means v. Dist. Court of the Chinle Judicial Dist., No. SC-CV-61-98, 1999 NANN 0000013, ¶ 11 (Navajo May 11, 1999) (VersusLaw); Navajo Nation v. Hunter, No. SC-CR-07-95, 1996 NANN 0000001, ¶ 32 (Navajo Mar. 8, 1996) (VersusLaw).

42. *Means,* 1999 NANN 0000013, at ¶ 62.

43. *See id.* at ¶ 63.

44. No. A-CV-34-87, 1988 NANN 0000012 (Navajo Nov. 10, 1988) (VersusLaw).

45. *Id.* at ¶ 26 (citations and quotations omitted).

46. *See id.* at ¶ 25.

If tribal courts can use the acknowledgment of their nations' sovereign powers in treaties to extend civil jurisdiction to regulate their internal and social relations, there may also be a basis for criminal jurisdiction. In the seminal case of *Means v. District Court of the Chinle Judicial District*,[47] the Navajo Nation Supreme Court addressed whether it had criminal jurisdiction over a non-member Indian who was charged with battery and threatening his father-in-law.[48] Under the *Duro* fix,[49] the federal government would have acknowledged the Navajo Nation's jurisdiction, as Means was a non-member Indian. However, the Navajo Nation Supreme Court declined to rely upon federal interpretation of the Nation's jurisdiction. Instead, the court examined its inherent authority over people living within the Nation's boundaries by looking to the Nation's own law and their treaties with the United States.[50] The Navajo Nation Supreme Court stated:

> There is a false assumption that Indian nations absolutely lack criminal jurisdiction over non-Indians . . . . [A]n individual who "assumes tribal relations" is fully subject to the laws of the Indian nation with which that person assumes such relations . . . . There are various ways an individual may "assume tribal relations" as a matter of Navajo common law: by entry within the Navajo Nation with the consent of the Nation pursuant to Article II of the Treaty of 1868; by marriage or cohabitation with a Navajo; or other consensual acts of affiliation with the Navajo Nation.[51]

The court used a *hadane*, or in-law, relationship to illustrate how a person becomes a "member" or establishes an intimate relationship that subjects his or her conduct to regulation by the Navajo Nation, regardless of his or her political status.[52] The *hadane* "assumes a clan relation to a Navajo when an intimate relationship forms, and when that relationship is conducted

47. 1999 NANN 0000013.

48. *Id.* at ¶ 11. *See also* Paul Spruhan, Note, *Means v. District Court of the Chinle Judicial District and the Hadane Doctrine in Navajo Criminal Law*, TRIBAL L.J. (2000-2001), *available at* http://tlj.unm.edu/tribal-law-journal/articles/volume_1/spruhan/index.php.

49. In response to *Duro v. Reina*, 495 U.S. 676 (1990), Congress passed an amendment to the Indian Civil Rights Act, acknowledging Indian nations inherent right to exercise jurisdiction over non-member Indians. *See* 25 U.S.C. § 1301(2) (2006). The U.S. Supreme Court subsequently upheld this statute. *See United States v. Lara*, 541 U.S. 193, 210 (2004).

50. *See Means*, 1999 NANN 0000013, at ¶ 68, 73.

51. Navajo Nation v. Hunter, No. SC-CR-07-95, 1996 NANN 0000001, ¶ 31-32 (Navajo Mar. 8, 1996) (VersusLaw) (citations omitted).

52. *See Means*, 1999 NANN 0000013, at ¶ 73.

within the Navajo Nation, there are reciprocal obligations to and from family and clan members under Navajo common law."[53] Further, "[a]mong those obligations is the duty to avoid threatening or assaulting a relative by marriage (or any other person)."[54]

The court also addressed an issue raised by the U.S. Supreme Court in *Duro*—that non-members are not able to participate in the nation's political processes.[55] The *Duro* Court expressed concern that the defendant's relationship with the Salt River Pima-Maricopa Indian Community was different than that of a tribal citizen and that the defendant did not have a voice in the community: "Petitioner [Duro] is not a member of the Pima-Maricopa Tribe, and is not now eligible to become one. Neither he nor other members of his Tribe may vote, hold office, or serve on a jury under Pima-Maricopa authority."[56] In response to these concerns, the Navajo Nation Supreme Court in *Means* noted that many non-member Indians, including Means, participate in the cultural life of the Navajos and that the defendant also participated in political events, including orchestrating a demonstration within the Navajo Nation.[57] Thus, despite Means' inability to become a Navajo citizen and exercise full citizenship rights, he was still able to participate in other ways within the Navajo Nation and have a voice as a *hadane* within the community.

In *Means*, the Navajo Nation Supreme Court went on to examine the U.S. government's acknowledgement of its jurisdiction over non-member Indians in the Treaty of 1868, analyzing its history and application.[58] The court stated:

> There are two foundations for criminal jurisdiction in the Treaty of 1868, the history of its negotiation, and its application: those who assume relations with Navajos with the consent of the Navajo Nation and the United States are permitted to enter and reside within the Navajo Nation, subject to its laws, and non-Navajo Indians who enter and commit offenses are subject to punishment.[59]

53. *Id.*
54. *Id.*
55. *See id.* at ¶ 47-48.
56. Duro v. Reina, 495 U.S. 676, 688 (1990).
57. *See Means*, 1999 NANN 0000013, at ¶ 48.
58. *Id.* at ¶ 61-67.
59. *Id.* at ¶ 67.

In examining the history, the court noted the purpose of the treaty and concluded that allowing an individual to live in the community and commit a crime would contradict the purpose of the treaty:

> Avoidance of retaliation and revenge is clear in the Treaty of 1868. General Sherman urged Navajos to leave the neighboring Mexicans to the Army, but he told Navajos they could pursue Utes and Apaches who entered the Navajo homeland. The Treaty speaks to the admission of Indians from other Indian nations. The thrust of the "bad men" clause was to avoid conflict. We use a rule of necessity to interpret consent under our Treaty. It would be absurd to conclude that our hadane relatives can enter the Navajo Nation, offend, and remain among us, and we can do nothing to protect Navajos and others from them. To so conclude would be to open the door for revenge and retaliation. While there are those who may think that the remedies offered by the United States Government are adequate, it is plain and clear to us that federal enforcement of criminal law is deficient. Potential state remedies are impractical, because law enforcement personnel in nearby areas have their own law enforcement problems. We must have the rule of peaceful law rather than the law of the talon, so we conclude that the petitioner has assumed tribal relations with Navajos and he is thus subject to the jurisdiction of our courts.[60]

The court found that it had criminal jurisdiction over Means, a non-member Indian, due to his *hadane* relationship with the Navajo Nation.[61] The court stated:

> We return to the basic document which establishes relations between the United States of America and the Navajo Nation. It permitted Navajos to return to their homeland from a concentration camp on the Pecos River in eastern New Mexico. Navajos listened intently on May 28, 1868 when General Sherman explained that they could punish Indians of other nations who entered the Navajo Nation . . . . This court finds that the Chinle District Court has jurisdiction under the Treaty of 1868, the petitioner has consented to criminal jurisdiction over him . . . .[62]

Means established that the Navajo Nation has criminal jurisdiction over non-member Indians not only by virtue of the *Duro* fix, but also through the Nation's inherent authority as a sovereign nation, which was recognized in the Treaty of 1868. With this issue resolved, the question turns to whether the Navajo Nation courts, and tribal courts in general, possess inherent authority, recognized by treaty, to exercise criminal jurisdiction

60. *Id.* at ¶ 76.
61. *Id.* at ¶ 12.
62. *Id.* at ¶ 84-85.

over non-Indians. It should be noted that non-Indians frequently live within Indian territories, are family members of Indian citizens, and obtain the same type of in-law relationship as in *Means*. Nonetheless, the Navajo courts have not yet published an opinion addressing the question whether they have inherent authority to exercise criminal jurisdiction over these non-Indians. The decision in *Means* was not based upon the defendant's political status or citizenship in another nation, but his relationship to the Navajo Nation. It is within reasoning that a non-Indian who has developed a *hadane* relationship with the Navajo Nation may be subject to the Nation's criminal jurisdiction by virtue of the Nation's inherent authority. However, it is not clear whether such inherent authority has been recognized by the Navajo Nation's treaties with the U.S. government. To explore this question further, we turn eastward to the Haudenosaunee nations, located in today's upstate New York, and examine whether the Haudenosaunee nations may exercise criminal jurisdiction over non-Indians based upon their inherent authority, as recognized by the Treaty of Canandaigua.

III. The Treaty of Canandaigua and Tribal Court Jurisdiction

The Treaty of Canandaigua,[63] signed by the Haudenosaunee and the United States in 1794, contains two articles that are important to the jurisdiction discussion. Article II acknowledges that lands reserved by prior treaties are the property of the Haudenosaunee, or Six Nations, and that the United States:

> [W]ill never claim the same, nor disturb them, or either of the Six Nations, nor their Indian friends, residing thereon, and united with them, in the free use and enjoyment thereof; but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.[64]

Similarly, Article VII states that the U.S. and Six Nations agree, in order to protect the peace and friendship now established, that:

63. Canandaigua Treaty, *supra* note 31.
64. *Id.*

> [F]or injuries done by individuals, on either side, no private revenge or retaliation shall take place; but, instead thereof, complaint shall be made by the party injured, to the other: by the Six Nations, or any of them, to the President of the United States, or the Superintendent by him appointed; and by the Superintendent, or other person appointed by the President, to the principal chiefs of the Six Nations, or of the Nation to which the offender belongs; and such prudent measures shall then be pursued, as shall be necessary to preserve our peace and friendship unbroken, until the Legislature (or Great Council) of the United States shall make other equitable provision for the purpose.[65]

The canons of construction for treaties provide important parameters for our discussion. U.S. Supreme Court decisions dictate that treaties are to be interpreted in light of the context in which the treaty was formed, including the history of the treaty, negotiations, and any practical construction developed by the parties.[66] Treaties are to be construed as Indian representatives understood them at the time of negotiation[67] and liberally interpreted to accomplish the purpose of the treaty.[68] Doubtful or ambiguous expressions are to be resolved in favor of the Indian nation.[69] Just as the Navajo Nation Supreme Court applied these canons in interpreting the Treaty of 1868, one must also apply them in order to properly interpret the meaning of the Treaty of Canandaigua. According to the canons of construction, one must look to the historical context faced by the Haudenosaunee at the time of signing of the Treaty, understand the Treaty provisions as the Haudenosaunee negotiators would have understood them, and resolve any ambiguities in favor of the Haudenosaunee.

Applying the canons of construction set forth in federal Indian law is, however, not without difficulty. Although the U.S. Supreme Court has held that treaties must be interpreted in the manner that Indian representatives understood them at the time of the negotiations, this understanding is only accepted when "the Indian nation can *prove* that its interpretation has a historical basis. And that of course is the trick, because most of the treaty records acceptable in court just happen to be docu-

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65. *Id.*
66. *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202 (1999).
67. *See* Tulee v. Washington, 315 U.S. 681, 684-85 (1942).
68. *See* Carpenter v. Shaw, 280 U.S. 363, 367 (1930).
69. *See id.*

ments written by Anglo-Americans."[70] The question then arises: how can an Indian nation *prove* that its interpretation has a historical basis if it does not have Anglo-style supporting documents? As it happens, tribal courts have already answered this question. In many tribal courts, questions about tribal traditions or historical accounts of events or activities are resolved by tribal experts or elders who come to court to share their expertise and teach the court about the issue in question.[71] Consistent with this accepted practice, we will look to the Haudenosaunee experts to understand the historical context of the Treaty of Canandaigua, and how the Treaty was understood by the Haudenosaunee negotiators.

At the outset, it is important to understand how the Haudenosaunee viewed treaties in general. As Paul Williams, a scholar on Haudenosaunee treaty-making, has explained, a treaty:

> [I]sn't a written document. It's an agreement. It's a coming together of minds. The written document is merely evidence of that agreement. Usually, it's incomplete evidence. The Haudenosaunee keep a record of the treaties on wampum belts. But nobody says, "That is a treaty." They say, "This helps us remember the treaty," because the treaty, the agreement, is kept in people's minds, the way it was made, in people's minds. And while it may be that details are kept better on paper, people who hold their treaties in their minds keep their treaties *in mind*, and are governed by them and live by them.[72]

In addition to the general Haudenosaunee view of treaties, one must also understand that any treaty after 1613 "would have been an extension of the premise of the 'Guswenta,' or 'Two Row Wampum Belt.'"[73] The Two Row Wampum Belt Treaty was made between the Haudenosaunee and the Dutch in 1613.[74] The wampum belt contains two rows of purple wam-

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70. Robert W. Venables, *Some Observations on the Treaty of Canandaigua*, *in* TREATY OF CANANDAIGUA 1794: 200 YEARS OF TREATY RELATIONS BETWEEN THE IROQUOIS CONFEDERACY AND THE UNITED STATES 84, 87 (G. Peter Jemison & Anna M. Schein eds., 2000) [hereinafter TREATY OF CANANDAIGUA BOOK].

71. Cultural questions often arise concerning custody of children, division of real and person property during a divorce, and wills and estates, as these questions often involve traditional values and laws impacting the court's decision about the proper outcome.

72. Paul Williams, *Treaty Making: The Legal Record*, *in* TREATY OF CANANDAIGUA BOOK 35, 36-37.

73. Venables, *supra* note 70, at 107.

74. Williams, *supra* note 72, at 24.

pum separated by three rows of white wampum.[75] The two rows of purple wampum represent the Haudenosaunee and the Dutch, and the subsequent colonialists who took upon them the Dutch treaties, living side by side, separated by peace and friendship.[76] The separateness of the rows represents that the canoe of the Haudenosaunee and the sailing ship of the Europeans would neither cross nor try to interfere with or steer the other's vessel.[77] In this view, the Haudenosaunee and the colonists were to live side by side in peace, not interfering in each other's government or way of life. "Even now, we use this Two Row Wampum Belt as the basis for all treaties, as we have since that time."[78] Thus, the Haudenosaunee brought to the negotiation of the Treaty of Canandaigua their understanding that the United States and Haudenosaunee exist side by side, as equals, with neither government interfering in the affairs of the other.

In addition to the Two Row Wampum Belt, the Haudenosaunee chiefs who negotiated the treaty were guided by the principles of the Great Law of Peace as taught by the Peacemaker, who formed the Six Nations Confederacy prior to the arrival of the European colonists. The Peacemaker brought the warring Haudenosaunee nations together, the Mohawk, Seneca, Onondaga, Cayuga, Oneida, and subsequently the Tuscarora, into the Six Nations Confederacy and bound them together using the concepts of peace.[79] Peacemaker taught that human beings whose minds are healthy desire peace, and that good minds are capable of resolving disputes peaceably.[80] The purpose of government is to "prevent the abuse of human beings by cultivating a spiritually healthy society and the establishment of peace."[81] Peace is defined as the active striving of humans "for the purpose of establishing universal justice."[82]

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75. *Id.* at 23. *See also* Chief Irving Powless Jr., *Treaty Making*, *in* TREATY OF CANANDAIGUA BOOK 15, 29.

76. Williams, *supra* note 72, at 24.

77. *Id.* at 23.

78. G. Peter Jemison, *Sovereignty & Treaty Rights—We Remember*, *in* TREATY OF CANANDAIGUA BOOK 149, 149.

79. A BASIC CALL TO CONSCIOUSNESS 67 (Akwesasne Notes ed., rev. ed. 1991) [hereinafter CONSCIOUSNESS].

80. *Id.* at 10.

81. *Id.*

82. *Id.*

Moreover, as the government and community strive for peace, decisions are also focused on future generations:

> In any Council, in any decision, the law requires that they ask themselves: what will this do to the seven generations yet to come? What will this do to the natural world? What will this do to peace? These are three lenses through which the lawmakers must see each question.[83]

Thus, all treaty negotiations would focus on maintaining peace through the separation of the Haudenosaunee from the American people, through peaceful relations between the Haudenosaunee and their neighbors, and protecting future generations.

A. Understanding the Historical Context

Prior to 1794, George Washington struggled to address Indian land claims and prevent the Haudenosaunee from joining the Northwest Confederacy of Indians in Ohio who were threatening to go to war.[84] The primary objective of the United States "was to settle the . . . claims of the Six Nations to lands in Ohio [and thus prevent any movement or joinder with the warring Shawnee or Miamis] and the Erie Triangle and to embark on a policy of sincere negotiations and fair payment in land transactions."[85] George Washington did not want the Six Nations to join the Northwest Confederacy because their combined strength could have been insurmountable for the fifteen states.[86] The newly formed Union could not afford another war. In other words:

> The 1794 treaty [of Canandaigua] was a treaty of accommodation, one of military and political necessity. Both parties could put men in the field. Both parties could do battle. Everything was at stake. As a consequence, the father of this country, George Washington, signed an agreement with the Haudenosaunee to forever, in perpetuity, keep peace and friendship among us.[87]

In addition to the threat of war, several other issues were plaguing the Haudenosaunee's relationship with the United States prior to the signing of the Treaty of Canandaigua. The

83. Williams, *supra* note 72, at 36.
84. *See* Powless, *supra* note 75, at 29; Williams, *supra* note 67, at 38.
85. John C. Mohawk, *The Canandaigua Treaty in Historical Perspective*, *in* TREATY OF CANANDAIGUA BOOK 43, 60.
86. *See* Jemison, *supra* note 78, at 152.
87. Chief Oren Lyons (Joagquisho), *The Canandaigua Treaty: A View from the Six Nations*, *in* TREATY OF CANANDAIGUA BOOK 67, 70.

Haudenosaunee had made several treaties since the Revolutionary War.[88] However, there was much confusion regarding these treaties, and the settlers regularly ignored the treaties and continued to encroach upon Haudenosaunee lands.[89] In addition, the 1768 Treaty of Fort Stanwix,[90] which involved a great deal of land loss for the Haudenosaunee, was the result of agreements reached by the United States with young, unauthorized Haudenosaunee warriors, a violation of settled treaty-making rules.[91] New York State also engaged in several land transactions that defied federal law and policy, which stated that only the federal government could engage in land transactions with Indians and that the federal government had the right of preemption.[92] Then New York State and individual state citizens committed a "series of land frauds," leaving even more hard feelings and damaging the relationship between the United States and the Haudenosaunee.[93]

The historical context of the Treaty of Canandaigua is further complicated by the burning issue of widespread murders of Indians by whites.[94] An example of this violence occurred in 1790 when two frontiersmen murdered two Senecas in Northern Pennsylvania.[95] The murder halted surveying of lands acquired in the Treaty of Fort Stanwix and again increased the likelihood of war.[96] Pennsylvania and federal officials who attempted to bring the men to justice did not satisfy the victims' families, as Haudenosaunee customs required blood revenge or compensation.[97] In an address to President Washington in 1790, Cornplanter, Half Town, and Big Tree charged the United States with failure to protect them from intrusion by white set-

88. *See, e.g.*, Treaty of Fort Harmar, Jan. 9, 1789, 7 Stat. 33.

89. *See* Powless, *supra* note 75, at 29. The Treaty of Fort Stanwix of 1784, the Treaty of Fort McIntosh of 1785, the Treaty of Fort Harmar of 1789, and the subsequent 1790 Non-Intercourse Act were all intended to prevent individuals or states from invading or buying Haudenosaunee territory. *See id.* at 29-30.

90. Treaty with the Six Nations at Fort Stanwix, Oct. 22, 1784, 7 Stat. 15.

91. *See* Williams, *supra* note 72, at 39.

92. *See id.* at 37. *See also* The Indian Trade and Intercourse Acts, ch. 33, 1 Stat. 137 (1790); ch. 13, 2 Stat. 139 (1802); ch. 161, 4 Stat. 729 (1834).

93. *See* Williams, *supra* note 72, at 39.

94. *See* Mohawk, *supra* note 85, at 59.

95. *Id.*

96. *Id.*

97. *Id.*

tlers.[98] In a letter responding to the Seneca leaders, George Washington acknowledged the problem of bringing white murderers of Indians to justice, in addition to the other problems plaguing the United States' relations with the Haudenosaunee.[99] This record of white-on-Indian violence illustrates that crime by non-Indians has historically been an important issue for the Haudenosaunee and that negotiations around this issue led to the inclusion of Article VII in the final treaty. Daniel Richter, a scholar of Haudenosaunee history, put it:

> [P]erhaps the best way to understand the Canandaigua Treaty of 1794 is to see it as an effort by its parties to undo some of the damage done in a series of earlier treaties among various Native leaders, the United States, New York, and Pennsylvania—damage epitomized by the competing forces at work.[100]

Chief Irving Powless Jr., an Onondaga Nation Chief, summarizes the historical context behind the treaty negotiations:

> We looked at what was happening to us at that time and the protection that George Washington gave us. He put into law the Non-Intercourse Act and then he said to the Haudenosaunee, "Herein lies your protection." The settlers still came and they still violated the law. We went back to George Washington, Hanadahguyus, and said to him, "Your people are still violating the treaties." George Washington sent out Timothy Pickering to meet with us. We gathered in Canandaigua, New York, in July of 1794. There for a six-month period we discussed the terms of an agreement between our peoples. Many issues were discussed during that six-month period, and these discussions were brought back to our separate nations. On November 11, 1794, we finally signed the treaty. This treaty was between the Haudenosaunee (the Six Nations) and the United States.[101]

B. The Haudenosaunee Negotiators' Understanding of the Treaty

To understand the Treaty of Canandaigua as the negotiators understood it, we must delve into Haudenosaunee law. This law speaks of three types of individuals: Haudenosaunee citizens, "Indian friends" residing and united with the Haudenosaunee, and United States citizens who commit injury.[102] Not coincidentally, these three categories also are found in the

98. *See* WILLIAM N. FENTON, THE GREAT LAW AND THE LONGHOUSE: A POLITICAL HISTORY OF THE IROQUOIS CONFEDERACY 634 (1988).

99. *Id.*

100. Daniel K. Richter, *The States, the United States & the Canandaigua Treaty*, *in* TREATY OF CANANDAIGUA BOOK 76, 77.

101. Powless, *supra* note 75, at 30.

102. *See* Venables, *supra* note 70, at 84.

Treaty of Canandaigua (in Article II).[103] It is important, therefore, to consider how Haudenosaunee law interpreted these three categories and whether the Haudenosaunee could exercise criminal jurisdiction over them.

1. HAUDENOSAUNEE CITIZENS

There is no question that Indian nations may exercise jurisdiction over their own people. Even the United States has acknowledged this right of Indian nations.[104] The basic purpose of Haudenosaunee government is to promote peace and prevent violence,[105] which requires engagement with individuals to restore their Good Minds[106] and facilitate justice. When the Peacemaker united the warring Haudenosaunee nations, he taught that all people have a Good Mind and with a Good Mind people could live in harmony and settle disputes without violence. Using a Good Mind, the Haudenosaunee prohibit or discipline certain types of conduct, such as wife beating, theft, treason, and murder.[107] As an aside, it is worth noting that the federal government has attempted to limit Indian nations' inherent power to regulate the conduct of their own citizens by passing the Indian Civil Rights Act,[108] which limits incarceration for criminal offense to one year and imposes other "due process" requirements.[109] Nonetheless, the federal government has not attempted to interfere with a tribal court's criminal jurisdiction over its own citizens.

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103. *See* Canandaigua Treaty, *supra* note 31. Article VII also addresses Haudenosaunee individuals or citizens who commit injuries upon U.S. citizens; however, that will be left for another discussion.

104. *See* Ex parte Crow Dog, 109 U.S. 556, 571 (1883); Williams v. Lee, 358 U.S. 217, 223 (1959).

105. *See* CONSCIOUSNESS, *supra* note 79, at 10-17.

106. The Good Mind is a Haudenosaunee concept referring to a mind that is healthy, makes good decisions, and has the power to peaceably reason out conflicts.

107. *See* GARROW & DEER, *supra* note 19, at 136.

108. 25 U.S.C. §§ 1301-1303 (2006).

109. *Id.* § 1302(7). However, when applying notions of due process, tribal courts apply their nation's definition of due process. *See* Hopi Tribe v. Mahkewa, No. AP-003-93, 1995 NAHT 0000008, ¶ 33-34 (Hopi App. Ct. July 14, 1995) (VersusLaw) ("The Hopi Tribe is not restrained by due process guarantees in the United States Constitution . . . .).

2. INDIAN FRIENDS

Article II of the Treaty provides that lands are set aside for the Six Nations and their "Indian friends, residing thereon [on recognized Haudenosaunee lands], and united with them in free use and enjoyment thereof."[110] However, the Treaty does not provide a definition of "Indian friends." It is not clear, for example, whether this term includes citizens of a non-Haudenosaunee Indian nation, American citizens adopted into a Haudenosaunee nation, or both. The only explanation offered by the Treaty is the language "residing thereon, and united with them in the free use and enjoyment thereof."[111] Far from clarifying the issue, this phrase simply adds to the confusion. Thus, we must look at how the Haudenosaunee negotiators would have interpreted "friend."

Haudenosaunee law defines "friend" in two ways. First, a non-Haudenosaunee person may be adopted into a Haudenosaunee nation—prior to being adopted, the Great Law simply refers to such a person as a member of a foreign nation, whether he is Indian or non-Indian.[112] Once the person is adopted, he becomes a citizen of the Nation with all its rights and responsibilities and gives up any claim to his former citizenship.[113] There are numerous examples of non-Indians being adopted by the Haudenosaunee, and then becoming valuable citizens and even leaders within different territories.[114] Certainly with the power to adopt, comes the power to regulate conduct. The Great Law requires adoptees to give up the laws of their former citizenship and follow the Great Law.[115] The War Chiefs disciplined new citizens if they committed an offense within the community, and upon the second offense they were expelled from Haudenosaunee territory.[116]

Second, it is possible that a person could become a friend without adoption. If the person arrives with other members of

110. *See* Canandaigua Treaty, *supra* note 31.

111. *Id.*

112. *See* A.C. PARKER, THE CONSTITUTION OF THE FIVE NATIONS OR THE IROQUOIS BOOK OF THE GREAT LAW 49-50 (Iroqrafts reprint 1991) (1916).

113. *Id.* at 50-51.

114. For example, the Mohawk leaders who first settled Akwesasne were former captives from New England who were adopted into the Mohawk Nation.

115. *See* PARKER, *supra* note 112, at 50-51.

116. *See* GARROW & DEER, *supra* note 19, at 80.

an alien nation, following the roots of peace, and agrees to live by the Great Law of Peace, he is allowed to remain.[117] These individuals are not formally adopted, but live peaceably in Haudenosaunee Territory. They do not have a voice within the Council, but may speak through other people or nations.[118] They agree to follow all the provisions of the Great Law, which includes following the principles of the Good Mind and working to keep and restore peace. Inherent in the Great Law is the idea that if an individual commits an offense, he and the victim must be restored to a Good Mind and peace must be restored. It would violate the principles of the Two Row Wampum or Guswentah that the individual could violate the Great Law and flee into the European ship. This would prevent the restoration of peace.

In short, the Haudenosaunee negotiators, experts in the Great Law, would have understood the term "friends," as used in Article II of the Treaty, to include: (1) individuals, both Indian and non-Indian, adopted into a Haudenosaunee nation; and (2) Indians from non-Haudenosaunee nations living among the Haudenosaunee and following the Great Law. The negotiators would have understood these "friends" to be subject to Haudenosaunee regulation of their conduct, including the commission of offenses or crimes. Moreover, they would have understood that the Great Law allows the Haudenosaunee to take necessary actions to address offenses and restore the Good Mind of these individuals.

3. UNITED STATES CITIZENS WHO COMMIT INJURIES

It is less clear whether the Haudenosaunee negotiators would have understood Article II to include non-Indian individuals who had not been adopted by the Haudenosaunee. It is most likely that the Haudenosaunee negotiators would have understood this type of individual to be dealt with separately under Article VII, which contemplates United States citizens who commit injuries to the Haudenosaunee. The Treaty seems to view these individuals as separate from Indian friends. In-

117. *See* PARKER, *supra* note 112, at 30, 50-51. It is unlikely that the Great Law would permit a non-Indian to become a "friend" in this manner, as most alien nations that were adopted in the Confederacy were Indian nations.

118. *See id.* at 51.

cluded in this category are non-Indian settlers who temporarily occupy Haudenosaunee territory and non-Indians who follow the roots of the tree of peace and live within a territory but are not formally adopted into a nation.[119] In either case, the key to this category is that it consists of individuals who have retained their American citizenship.

The question becomes, what type of criminal jurisdiction, if any, does Article VII recognize over these individuals? Again, we must turn to the understanding of the Haudenosaunee treaty negotiators. In the context of the Two Row Wampum and the Great Law, the Haudenosaunee would not agree to any terms that would allow a foreign government to interfere with their government or detrimentally affect the peace of the nations at that time or for future generations. The focus would have been on maintaining and restoring peace once an offense was committed. It is therefore not surprising that the negotiators would agree to notification of the U.S. government when a United States citizen has committed a crime. Notification would allow the U.S. government to discipline its own citizens without interference by the Haudenosaunee government, consistent with the Two Row Wampum. However, the negotiators would not have envisioned allowing an individual to commit an offense and never be disciplined or have peace restored, particularly if that individual would continue to reside within Haudenosaunee territory and the Nation would incur the risk the offense would happen again. Such a result would be contrary to the principles of the Great Law. Keeping in mind that the purpose of Haudenosaunee government is to prevent abuse and promote peace, it is unthinkable that an individual, even if a citizen of another nation, would be allowed to engage in abuse with no consequences.

Article VII contains no language to indicate a concession of Haudenosaunee jurisdiction. The only stipulation contained in Article VII is that "no private revenge and retaliation shall take place."[120] By definition, any regulation or discipline that is based upon the philosophy of the Great Law is far from revenge and retaliation, but rather focused upon restoring the offender's

119. *See* Canandaigua Treaty, *supra* note 31.
120. *Id.*

Good Mind. The perspective of the negotiators would have allowed extradition of offenders to maintain separation. But they never would have understood Article VII to allow for interference in their government's ability to restore peace to an individual who remained in the community or to the community itself.

C. Resolving Ambiguities in Favor of the Haudenosaunee

Any ambiguities within treaties must be resolved in favor of the Haudenosaunee.[121] In analyzing any ambiguities, it is important to keep in mind the purpose of the Treaty, which was to address the ongoing problem of crime and violence, to keep the peace, and to preserve Haudenosaunee land. Bearing these principles in mind, there are three major ambiguities presented by the Treaty that bear upon the question of criminal jurisdiction. First, does Article VII remove the Haudenosaunee's jurisdiction over those who commit misconduct on Haudenosaunee land? Second, what does the Treaty mean when it says that misconduct will be met with "prudent measures?" And third, is the U.S. Supreme Court's *Oliphant* decision, which strips Indian nations of jurisdiction over non-Indian offenders, consistent with the Treaty's provision that the "Legislature of the United States" may make "other equitable provision" for the purpose of addressing misconduct on Haudenosaunee land?

The Treaty's requirement in Article VII that the U.S. government be given notice of wrongdoing on Haudenosaunee land does not imply that the Haudenosaunee must refrain from exercising jurisdiction over the wrongdoer. The Great Law is clear—those who follow the roots of peace, to live under the tree of peace, must abide by the Great Law.[122] There is no provision within the Great Law that would allow for another nation to come in and exercise jurisdiction over a person within Haudenosaunee territory. On the contrary, such interference would directly contradict the premise of the Guswentah. Is it conceivable that the authors of the Treaty envisioned extraditing the non-Indian and returning him to United States' authorities? Most likely, and this would also be consistent with the philosophy of the Guswentah, traveling side by side, but not

121. *See* Carpenter v. Shaw, 280 U.S. 363, 367 (1930) (holding that any ambiguities must be resolved in favor on the Indian tribe).

122. *See* PARKER, *supra* note 112, at 30, 50-51.

crossing. However, it would be unthinkable to allow a person to remain within Haudenosaunee territories and allow another nation to exercise jurisdiction over the person. Thus, if the person is to continue to reside in the territories and not be extradited, the Treaty must be read to permit the Haudenosaunee to exercise jurisdiction and respond to the wrongdoing using its own justice processes.

Article VII also states that, once a complaint is filed with the federal government, "prudent measures shall be pursued."[123] It is clear from the Treaty language that prudent measures cannot include private revenge or retaliation. However, the Treaty does not state that the only prudent measure permitted is to extradite the offender back to federal authorities. On the contrary, the Haudenosaunee would interpret this provision to mean that holding an individual accountable for his conduct through traditional Haudenosaunee processes is permissible as long as there is no revenge or retaliation involved. Typically, the Haudenosaunee would offer a process for the offender to make amends, and this process would include restoring peace to the individual so he does not re-offend as well as making restitution to the victim so peace is restored to the victim and the overall community.

There is often a fear by federal courts that offenders in tribal courts will not be protected by western notions of due process.[124] This fear is unfounded, however, as Haudenosaunee processes include Haudenosaunee notions of "due process" to protect the individual. Everyone has a right to speak.[125] Thus, the offender has the right to tell his side of the story if he chooses to do so. No attorneys are included in a traditional dispute resolution proceeding, as the process focuses on talking things out.[126] However, the offender is not subject to incarceration.[127] Also, because the focus is on restoring peace, there is more emphasis on finding the truth rather than on procedural maneuvering. Moreover, there is much more of a focus on

123. *See* Canandaigua Treaty, *supra* note 31.
124. *See, e.g.*, Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).
125. *See* PARKER, *supra* note 112, at 55.
126. *See id.* at 55-56.
127. *See id.*

helping the offender become healthy, which is not traditionally the focus of the western justice system.

Finally, Article VII states that the "Legislature of the United States" may make "other equitable provision" for the purpose of addressing individual misconduct on Haudenosaunee land.[128] The Treaty, however, does not define "other equitable provision" or offer any guidance for what kind of alternative process would be considered acceptable. In the context of the Guswentah, "other equitable provision" must consist of an action that would not interfere with either the United States or Haudenosaunee government.[129]

Since the U.S. Supreme Court's decision in *Oliphant*, however, federal law has explicitly interfered with the Haudenosaunee government's ability to administer justice on its own land. *Oliphant* purports to strip the Haudenosaunee of their authority over non-Indian offenders. At the same time, the Major Crimes Act,[130] which was purportedly enacted to give the federal government the power to prosecute serious crimes on Indian land, has not resulted in the protection of Indian victims.[131] Indian victims are treated very differently, and far less equitably, than non-Indian victims.[132] Despite the federal government's numerous laws and court cases addressing crime and criminal jurisdiction in Indian country, Indians continue to be subject to a much higher rate of crime than non-Indians.[133] Moreover, United States Attorneys continually decline to prosecute cases in Indian country and refuse to share their declination rates.[134] Consequently, Indian victims and nations are less likely to be involved in an equitable dispensation of justice. This is not how the Haudenosaunee negotiators would have interpreted the phrase "other equitable provision." A Haudenosaunee interpretation of "other equitable provision" would never entail a complete removal of jurisdiction over people who

128. *See* Canandaigua Treaty, *supra* note 31.
129. Extradition would be permissible under the Guswentah because it involves returning the other government's citizen to face consequences for their offense under the other government's system of justice. Thus, there is no intergovernmental interference.
130. ch. 341, § 9, 23 Stat. 385 (1885) (current version at 18 U.S.C. § 1153 (2006)).
131. *See generally* Washburn, *supra* note 22; Washburn, *supra* note 19.
132. *See* Washburn, *supra* note 22, at 714-15.
133. *See id.*
134. *See id.* at 733 n.103.

are living within their territories because such an interpretation would violate the Guswentah and principles of the Great Law. In fact, "many Iroquois believe that Article VII constitutes a promise of recognition of parallel legal jurisdiction far greater than they have enjoyed since 1794."[135]

As explained above, United States law requires treaties to be construed and interpreted as Indians would have understood them.[136] Given the Haudenosaunee's understanding of treaties in general, the Great Law, the Guswentah, and the historical context surrounding the signing of the Treaty of Canandaigua, there is little doubt that the treaty negotiators believed they would be able to exercise jurisdiction over individuals who committed misconduct on Haudenosaunee land.

D. The Treaty of Canandaigua in Action

It's nice to sit in the ivory tower of academia and pontificate about using a nation's inherent sovereign powers as recognized by a treaty as a basis for criminal jurisdiction. But what about the real world? How does this affect a Haudenosaunee woman living in Haudenosaunee territory whose live-in non-Indian boyfriend assaults her? Under tribal civil jurisdictional rules, he could be excluded from the territory and a restraining order issued.[137] But it's unlikely that he would be prosecuted under state or federal law. And what if there is some hope to resolve the relationship and a child is involved? Should the child completely lose his father (to exclusion from Haudenosaunee territory) simply because the *Oliphant* Court decided, in a case that occurred thousands of miles away under a completely different historical context, that a tribal court could not exercise jurisdiction over a non-Indian? There must be a better solution to heal and restore the family, if that's the desire of the victim, and keep the community healthy. Using the Treaty of Canandaigua as an example, let's examine how a tribal court[138] might exercise jurisdiction over the offender.

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135. *See* Mohawk, *supra* note 85, at 61.

136. *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202 (1999).

137. *See* GARROW & DEER, *supra* note 19, at 118 (noting the Navajo Nation courts' use of this tactic).

138. It's important to note that several of the Haudenosaunee nations do not use westernized tribal courts, but still use traditional dispute resolution forums.

Under the philosophy behind the Treaty of Canandaigua, the Haudenosaunee nation and the United States are separate sovereigns and are not to interfere in each other's governance. The offender, as a non-Indian, falls within the provisions of Article VII.[139] No private revenge or retaliation is allowed.[140] A complaint must be made to the United States.[141] Thus, if the Indian nation wanted the individual who committed a domestic violence offense removed or extradited and punished by the federal or state government, they should simply request the removal of the offender.

A real-world success story illustrates how Article VII can work. In 1991, the Onondaga Nation chiefs sent a letter to President Bush, informing the U.S. government of a chemical dump on the Nation's territory.[142] The chiefs stated, "the toxic waste likely came from [United States] citizens," not Onondaga Nation citizens, and invoked Article VII requesting that cleanup occur.[143] One year later, the federal Environmental Protection Agency removed 1,300 drums of solvents and billed a Delaware chemical company.[144] As this was a problem that the Onondaga Nation was not equipped to handle and was not financially responsible for remedying, the federal government was the appropriate entity to resolve the problem. Unfortunately, this process has not been similarly successful in cases of day-to-day criminal activity. The federal government generally has not considered "regular" criminal activity to be serious enough to warrant investigation and prosecution, as illustrated by the discussion above. In these "regular" criminal cases, the "prudent measures" portion of Article VII should allow the Haudenosaunee to deal with the offender using its own justice processes.

These forums, whether they're clan mothers working to resolve the dispute or chiefs, also retain the power and jurisdiction under the Treaty of Canandaigua to exercise jurisdiction over non-Indians.

139. *See* Canandaigua Treaty, *supra* note 31.

140. *Id.*

141. *Id.* Because the federal government has granted New York State criminal jurisdiction, in all likelihood the offender would be turned over to county or state authorities, unless the crime was serious enough to qualify as a federal offense under the Major Crimes Act.

142. *See* Jemison, *supra* note 78, at 155.

143. *See id.*

144. *See id.*

As discussed above, the Treaty of Canandaigua does not prohibit Haudenosaunee jurisdiction over offenders who commit misconduct on Haudenosaunee land. In such cases, the tribal court should give notice to the federal government, as required by the Treaty, that it is exercising jurisdiction over a United States citizen. Notice should include the offense charged, the details of the offense, and any due process procedures in place to protect the accused's rights. It is important for the tribal court to include information about due process protections—the federal government has continually expressed concern about tribal courts exercising jurisdiction over non-Indians because of a perception that these individuals, as non-community members, will not receive adequate due process protections.[145]

Since the Haudenosaunee negotiators envisioned a "prudent measure" under the Treaty to include the restoration of a Good Mind for the offender and victim, the tribal court should focus upon these goals. In a domestic violence case, restoration of a Good Mind may require that the parents no longer live together. However, an appropriate disposition would include measures to heal the offender so he could be a healthy father, provide for the child, and keep the child safe. These measures might include counseling for the offender, a rehabilitation program, community service, restitution to the victim, and whatever else may be necessary to help the individual bring peace back into his life, his family, and those around him.

In addition to restoring a Good Mind for the offender and victim, the tribal court must dispense justice, which may include some form of punishment. Common forms of punishment in tribal court include financial punishment or punishment that requires shaming or requiring the defendant to acknowledge his wrong behavior.[146] Effective forms of shaming include requiring a defendant to request assistance from an elder in becoming healthy, which involves disclosing the wrong behavior, making a public apology, or being temporarily

145. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978).

146. *See, e.g.*, Pakootas v. Colville Confederated Tribe, No. AP-94-023, 1997 NACC 0000007, ¶ 16, 23 (Colville Ct. App. Mar. 24, 1997) (VersusLaw) (affirming a lower court decision to impose a punishment of $750.00 and a thirty day jail sentence).

banned from tribal activities. Thus the community becomes aware of the offender's behavior and the offender must acknowledge his wrong-doing. In domestic violence cases, physical punishment was traditionally allowed—abusers were sometimes required to hit a hot rock and suffer the hot sparks flying off the stone so they would be reminded never to abuse a woman again.[147] However, this might not be an appropriate form of punishment for non-Indians today as physical punishment is not allowed in the modern western court system. Also, the tribal court should be cautious about incarcerating a non-Indian, as some would argue that incarceration is not a Haudenosaunee form of punishment and is not what the Haudenosaunee negotiators envisioned in agreeing to Article VII.

IV. Concluding Thoughts

It is imperative that tribal court judges and advocates use their own laws to exercise their inherent sovereign powers, as recognized by treaties, to assert jurisdiction over citizens, friends, and even non-Indians. Many treaties address jurisdictional issues, and if nations want to preserve their jurisdictional powers and protect their citizens, they need to exercise these powers. Using the federal government's interpretation of tribal sovereignty, which continually limits the nation's powers to regulate individuals within its territory, will only further the colonization process and limit the nation's ability to protect its citizens. By turning to our own laws and using the federal government's acknowledgement of those laws through treaties, we will be better able to retain our sovereign status and ensure that indigenous justice is present in our communities.

In analyzing treaties, we must ensure that we understand the treaty as the Indian nation, especially the treaty negotiators, understood the treaty. Also, we must understand the Indian nation's philosophy surrounding the treaty. Are there previous treaties that form a foundation for subsequent treaties that address jurisdiction? Furthermore, we must understand the historical context from the perspective of the Indian nation. What

147. *See* SALLY ROESCH WAGNER, SISTERS IN SPIRIT: HAUDENOSAUNEE (IROQUOIS) INFLUENCES ON EARLY AMERICAN FEMINISTS 66 (2001).

problems were occurring prior to the treaty? What was the true purpose of the treaty as illustrated by the historical context? Based on the nation's law, how would they have understood the treaty provisions? Finally, ambiguities are to be resolved in favor of the Indian nation. Thus, analyzing how the nation would interpret the ambiguities based on tribal law is critical. Are there elders who are experts on the treaty who can explain its meaning? Has the Court interpreted the treaty in prior court cases?

All of these steps must be taken to analyze how a treaty impacts Indian nation jurisdiction before beginning to assess whether *Oliphant* or other federal Indian law applies, as the law of the Indian nation is its "law of the land." As we rely upon a nation's inherent sovereign powers, as defined by tribal law and recognized by treaties with the United States, our citizens, friends, guests, and communities will have more peace and become stronger. As our people become stronger, our nations too will strengthen and become what our treaty negotiators were working towards—strong, healthy, and sovereign nations.