

# 10<sup>th</sup> Campion School Model United Nations | 8<sup>th</sup>– 9<sup>th</sup> October 2022

Committee: Legal Committee (GA6)

Topic: Strengthening Tribal Court Systems

Student Officer: Patrick Pingan Yao

Position: Co-chair

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## Personal Introduction

Esteemed Delegates,

My name is Patrick Yao. I am a 14-year-old Year 10 student from Campion and I am extremely excited to be serving as a co-chair in the Legal Committee in this year's conference. This will be my first time chairing in MUN and I will be guiding you through the topic of "Strengthening Tribal Court Systems".

This conference will be my 6th MUN experience. Since it is my first time in the position of a student officer, I will be striving to assist you through the conference and do my best to make your two days at my own school enjoyable and fruitful. I hope that in the process you will gain not only satisfaction and friendship, but most importantly, more critical thinking and skills of debating.

My job through this study guide is to give you a brief and basic look at the topic. Since law is such a crucial part of our lives, it is essential that you read through it to fully understand the topic and to think of possible solutions. I look forward to seeing you! Should you have any doubts and questions, do not hesitate to ask. You can contact me through the email below.

Best regards

Patrick Yao

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## Topic Introduction

Nowadays, we live in a modernized and industrialized society, and we abide to all the laws and rules set to us by the government and the congress. We tend to ignore that among us, there are still numerous tribes in which their members still live away from the majority of the population and are “very ethnically different” in their ancestry and culture. Even though tribes exist in many parts of the world such as Africa and Australia, the best example of this would clearly be the Indigenous Tribes of Native Indians in the United States of America. The people living in these tribes are actually the oldest inhabitants of America, yet, most of the Americans we tend to recognize now are from Europe, after the discovery of the continent by Columbus in 1492. The influx of the descendants of Anglo-Saxons from the UK, Germany, and other countries in Europe, into America in search of a better life, caused the indigenous people to lose their power over their land, so they had to surrender. Since then there have been tribes all around the country where indigenous people live a very unique life. Due to the mass number of Indigenous Americans in the country and the size of the tribes, the American government recognizes them as independent nations and sovereign governments. They are subordinate only to the federal government, which gives it a special role in American society. Therefore, tribes also have the need to set up their own tribal courts, as they face special problems that normal American civilians do not normally encounter. Tribes constantly face challenges such as poverty and exploitation, economic and technical backwardness, socio-cultural handicaps, assimilation with the non-tribal population, and illiteracy, which pulls back and arrests development.

Right now, there are 574 Indian tribes across America, with around 400 of them having their own courts. There has been much legislation to give them special jurisdictional power, which are very crucial to the running and continuation of the tribes as the tribal courts cope with multiple different issues. One of the most severe ones is about tribal membership, a court problem exclusive to tribes. Additionally, they often cope with child welfare, protection, and family law. Some of the crime trials can also take place. Currently, many of the tribal courts are not competent enough to cope with all of



those issues, so hence, is it very important to strengthen and improve the efficiency of the Tribal Courts to ensure that all the tribe members are able to live a decent life.

## Definition of key terms

### Indigenous

Describing a person to be originating and naturally occurring in a particular location, or to be the native of a place, where a specific group has been dwelling there for a long period of time.<sup>1</sup>

### Jurisdiction

Any authority, mandate and power a court or an official organization has to make legal decisions and judgments.<sup>2</sup>

### Tribe

A group of people who live together in the same place, come from the same ethnic origin, and have the same ancestry, in which they practice the same religion, speak the same language, and follow the same traditions and culture. Usually, members of a tribe live away from cities and towns.

### Tribal Court

A court that is established and run by a federally approved and recognized Indian Tribe. Generally, a tribal court can have its own prosecutors and other components of a court. It copes with problems such as tribal membership and can mostly make its own decisions, not following the state that it is located in. The courts are empowered to

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<sup>1</sup> “Indigenous.” Indigenous Adjective - Definition, Pictures, Pronunciation and Usage Notes | Oxford Advanced Learner’s Dictionary at OxfordLearnersDictionaries.com, <https://www.oxfordlearnersdictionaries.com/definition/english/indigenous?q=indigenous>.

<sup>2</sup> “Jurisdiction.” Cambridge Dictionary, <https://dictionary.cambridge.org/dictionary/english/jurisdiction>.



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resolve conflicts and disputes arising from within a tribe's jurisdiction, and to enforce tribal law.<sup>3</sup>

### Tribal Priority Allocation (TPA)

It is the main funding and supporting source for all the tribal courts across America. Not only does it economically aid the tribal courts for further development and improvement, it also funds the tribal nation's government for social welfare.

### Bureau of Indian Affairs (BIA)

A federal agency within the United States Department of the Interior, whose main goal is to render and provide service to all the native tribes and indigenous Americans across the country. It is also dutiful for implementing federal laws and policies to the American Tribes.<sup>4</sup>

### Court of Indian Offenses (CFR courts)

A court that operates where tribes retain jurisdiction over American Indians that is exclusive of state jurisdiction, but where the specific tribal courts have not been established to fully exercise that jurisdiction.<sup>5</sup>

### Tribal Law

A type of law that only applies to all or certain tribes, passed by a tribal government, which only affects members living in the specific place.<sup>6</sup>

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<sup>3</sup> ReelLaw, director. What Is a Tribal Court?, ReelLawyers, 29 July 2016, [https://www.youtube.com/watch?v=mhi3ObKUu\\_Q](https://www.youtube.com/watch?v=mhi3ObKUu_Q). Accessed 15 July 2022.

<sup>4</sup> "Bureau of Indian Affairs (BIA)." Indian Affairs, <https://www.bia.gov/bia>.

<sup>5</sup> "CFR Court History." *Indian Affairs*, <https://www.bia.gov/CFRCourts/southern-plains-cfr-court/History>.

<sup>6</sup> Felicity Barringer Interview Oct. 7, 2021 Like Tweet Email Print Subscribe Donate Now. "How the U.S. Legal System Ignores Tribal Law." *High Country News – Know the West*, 7 Oct. 2021, <https://www.hcn.org/articles/law-how-the-us-legal-system-ignores-tribal-law>.



## Indian reservation

Land that is owned, held and governed by an federally recognized Indian tribe, in which the state has no direct authority over it.

## Tribal Sovereignty

It is a concept for indigenous tribes to have their own authority (tribal government) to govern themselves and make their own laws within the border of America, due to the fact that they are the earliest inhabitants of the land. Tribal sovereignty encompasses legal, cultural, political, and historical traditions that are a complex mix of both European and Indigenous approaches to governance.

## NCAI (National Congress of American Indians)

An American Indian and Alaska Native rights organization in the US aimed to serve as a forum for unified policy development among tribal governments to protect tribal governments and promote economic development.<sup>7</sup>

## Assimilation

Any attempt to integrate a minority group to the mainstream society and trying to make them culturally resemble the majority in their habits, behaviors and traditions.

## Background Information

### The History of the Tribal Courts

Native American communities have administered justice on their territorial homelands since time immemorial, applying their own traditions and customs to effectively resolve disputes among Tribal members. Today, most Tribes employ a system of justice that is modeled on the United States federal courts and retain traditional mechanisms for purposes of sentencing and alternative dispute resolution. The result is

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<sup>7</sup> www.browsermedia.com, BrowserMedia -. "About NCAI." NCAI, <https://www.ncai.org/about-ncai>.



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a truly unique adjudicative process that has become a model among American court systems.

In the beginning when the United States just formed as a country because of the American Revolution, the new government, followed by President George Washington, did not have any relation nor connection with the native Americans then. Therefore, a treaty that can be seen as a landmark is the one signed in 1778 with Indian nations, called the Treaty of the Delawares<sup>8</sup>. The treaty represents the first official negotiation between the US government and native American people, aimed to gain support for peace and friendship for an alliance against the British.

As early as 1846, the US court confirmed that Indian Nations had retained much of their inherent sovereignty over their people and territories. However, the modern tribal courts didn't have their earliest form of operation until 1883, when the case "Ex Parte Crow Dog"<sup>9</sup> was ruled. The case was significant in the development of the Tribal Courts because it was the first one in modern murder records where a tribal member was killed. Due to the severity of the murder, the federal government sought to bring more strict punishment to the murderer, "Crow Dog", hence the set up of Department of Indian Offenses, arranged by the Department of the Interior. It was established in order to handle minor crimes and offenses related with tribal affairs as well as resolve disputes between tribal members, bringing more justice to Indian Americans.

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<sup>8</sup> "First Written Treaty between the U.S. and a Native American Nation to Be Shown at the American Indian Museum." *Smithsonian Institution*, <https://www.si.edu/newsdesk/releases/first-written-treaty-between-us-and-native-american-nation-be-shown-american-indian-museum>.

<sup>9</sup> "The History of the Tribal Courts." *The Mashantucket (Western) Pequot Tribal Nation*, <https://www.mptn-nsn.gov/tchistory.aspx>.





Figure 1: President Obama giving tribal courts lost authorities<sup>10</sup>

The next major change would be the change of Indian Policy in 1934, or else known as the Indian Reorganization Act.<sup>11</sup> Under this act, the tribes were encouraged to enact and adopt their own laws and to establish their own justice systems to be able to counter all the difficulties they faced at that time, such as the lack of financial supply for development, and tribal membership issues. However, many of the tribes back then were impoverished and penniless due to years of devastating Indian Policies (including assimilation policies and removal of reservations brought up by the federal government) before and did not have any financial means to set up their own justice system or court, nor could they make their own tribal codes. Those tribes, which did not have any choices or alternatives, could only operate under provision of the Code of Federal Regulations (CFR). CFR courts were therefore used. Today, a few of them still exist, mostly in Oklahoma.

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<sup>10</sup> Crane, Steve. "After Decades, Tribal Courts, Police Slowly Regaining Lost Authority: Cronkite News." *Cronkite News - Arizona PBS*, 5 Nov. 2019, <https://cronkitenews.azpbs.org/2018/05/08/after-decades-tribal-courts-police-slowly-regaining-lost-authority/>.

<sup>11</sup> "Indian Reorganization Act (1934)." *Living New Deal*, 19 Oct. 2020, <https://livingnewdeal.org/glossary/indian-reorganization-act-1934/>.

A more recent legal ruling on tribal court is the Dollar General Corp. v. Mississippi Band of Choctaw Indians<sup>12</sup>, in 2016. It was a supreme court case in which the court was asked to determine the tribal courts' jurisdiction over a case involving the operation of Dollar General Store on tribal land. There are numerous similar cases that gradually and progressively build up to every aspect of law reinforcement of tribal courts.

Nowadays, an estimated 300-400 Indian nations or Alaska native villages have established formal tribe systems. All of these courts vary in style and the way they are run, but the majority of them follow the procedure of Western-style judiciaries where written laws and rules are applied.

### Oliphant v. Suquamish Indian Tribe

This is one of the more recent and historically significant supreme court rulings in the 20<sup>th</sup> century that impacted the way that tribal courts run in America. The case, ruled on March 6 1978<sup>13</sup>, decided that Indian tribal courts have no criminal or civil jurisdiction over non-Indians. This caused several cases, that include an Indian victim and a non-Indian perpetrator not eligible to be ruled in tribal courts, which to an extent decreased their jurisdictional power. This case was later abrogated by the Congress partially with the Violence Against Women Reauthorization Act of 2013<sup>14</sup>, which in fact recognized the criminal jurisdiction of tribes over non-Indian perpetrators of domestic violence that occur in Indian country or pueblo where the victim is of Indian origin.

### The Termination Era & The Self-Government Era

Years 1934-1953 saw a period called the “Self-Government Era”, following the “Indian Reorganization Act”. During this period the government sought to give more self-

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<sup>12</sup> “Dollar General Corp. v. Mississippi Band of Choctaw Indians.” *Wikipedia*, Wikimedia Foundation, 18 June 2021,

[https://en.wikipedia.org/wiki/Dollar\\_General\\_Corp.\\_v.\\_Mississippi\\_Band\\_of\\_Choctaw\\_Indians](https://en.wikipedia.org/wiki/Dollar_General_Corp._v._Mississippi_Band_of_Choctaw_Indians).

<sup>13</sup> “Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).” *Justia Law*, <https://supreme.justia.com/cases/federal/us/435/191/>.

<sup>14</sup> *H.R. 11 - 113th Congress (2013-2014): Violence against Women ...* <https://www.congress.gov/bill/113th-congress/house-bill/11>.





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governing power to Indian Americans and gave them more sovereign control over their territories, and established policies to give the tribes more jurisdictional authority. However, things began to change in 1953 as it was the start of a new era called the “Termination Era” that lasted until 1968<sup>15</sup>. It was caused by a surge of new opinions in the congress believing that tribes should no longer exist and should be closed down. As people’s views started to change, the government passed policies in an attempt to assimilate all tribal nations into the mainstream society, by passing sets of “Indian termination policy”. These policies included multiple attempts to deprive Indian American of their status, by methods such as relocating families to big cities and teaching them life skills in an urban life. They also transferred the Indian Health Care Programs to Public Health Service so that the treatment of Indian Americans were more similar to what the normal population received. The government sought to make tribes disappear in American culture. Though it was strongly opposed by the tribes, they could do nothing against it. Fortunately, after this period, some new policies were passed that gradually gave tribes more identity once again, following President Lyndon Johnson’s win of the U.S election. He sought to give Indian Americans more sovereign rights. One example is the Economic Opportunity Act of 1964<sup>16</sup>, which was an attempt led by the President to bring an end to tribal poverty and provided an infusion of federal funds which helped rebuild the devastated tribes. The era was officially put to an end in 1971 when federal policy of termination was reversed by senate concurrent resolution 26 which allowed Indian tribes to determine their own future.

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<sup>15</sup> “Tribal Self-Governance Timeline.” *Tribal Self-Governance*, 29 June 2021, <https://www.tribalselfgov.org/resources/milestones-tribal-self-governance/>.

<sup>16</sup> Ibid



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Following the reversal saw a massive attempt by the government and the congress to give Indian tribes more empowerment in the 1970s. This period was later known as the Self-Determination Era, in contrast to The Termination Era. These laws enabled tribes to regain their status and additionally allowed them to develop in all aspects of life quality, as the government provided support and funding. Some of these policies were solely made to strengthen the tribes' justice systems. These policies include the Indian Self-Determination and Education Assistance Act, Indian Health Care Improvement Act etc.

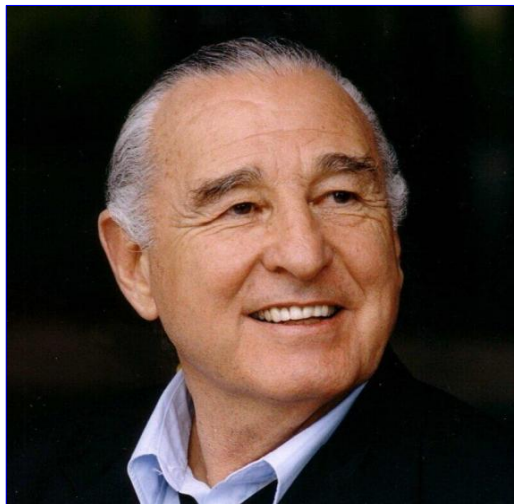


Figure 2: Ben Nighthorse Campbell, a past senator, said that “If you can’t change them, absorb them until they simply disappear into the mainstream culture. In Washington’s infinite wisdom, it was decided that tribes should no longer be tribes, never mind that they had been tribes for thousands of years.”<sup>17</sup>

### Difficulties tribal courts face

One of the most crucial issues that all tribes have in common is the assimilation that has taken place in the past few years. It has caused an increasing influx of indigenous people into the mainstream American community, and to step out of the traditional lifestyle. Their mindset gradually changes as they acclimate to city life. This gives tribal courts an “on the fence” situation, where neither the tribal jurisdiction nor the normal jurisdiction applies

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<sup>17</sup> “Campbell.” *Sand Creek Massacre Foundation*, <https://www.sandcreekmassacrefoundation.org/campbell>.

to them. It is a dilemma for the country, as a person that once becomes tied to a legal court case, is both eligible for a tribal court ruling and a generic one, which causes a delay in the legal process of a crime sentence.

Another critical situation is the sovereignty of Native Tribes when it comes to tribal court jurisdiction over people who are not members of the tribe asserting that jurisdiction. This also has been a problem the supreme court has been dealing with in the past years. One example is the *Duro v. Reina* case, which includes criminal jurisdiction. The supreme court, in this case, applied the *Oliphant* case precedent to hold that a tribe does not possess power to exercise their jurisdiction to non-members and therefore the litigation had to fail.

Drug and substance abuse has also been a common topic of discussion in tribal justice systems. Tribal leaders have long-stated that, “there is a crisis situation on Indian reservations, where substance abuse and violent crime continues to devastate communities at rates much higher than the national average.”<sup>18</sup> Due to high rates of alcohol and drug related offenders which dominate the resources of the justice system, the BIA created the Diversion and Re-entry Division (DRD) to work with tribes to strengthen and expand treatment options to ensure justice and safety, consequently preventing substance abuse.

Economic backwardness is also one of the main factors pulling back tribal court improvement. Federally recognized tribes, especially the ones in less-affluent states, suffer more from lack of capital to build up their justice systems. Due to this drawback, they often face difficulty bettering juridical systems. This is addressed with TPA (Tribal Priority Allocations) funding as well as BIA’s disbursement in a rescue plan to tribes, started from March 11, 2021<sup>19</sup>.

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<sup>18</sup> “Tribal Court Systems.” *Indian Affairs*, <https://www.bia.gov/CFRCourts/tribal-justice-support-directorate>.

<sup>19</sup> “Indian Affairs Begins Disbursement of \$900 Million in American Rescue Plan Funding to Tribes across Indian Country.” *Indian Affairs*, Indian Affairs, 30 Apr. 2021, <https://www.bia.gov/news/indian-affairs-begins-disbursement-900-million-american-rescue-plan-funding-tribes-across>.



In addition, tribal courts exist to cope with issues that occur within the tribe. A common cause of problems within the tribal courts can usually happen in 3 ways: tribal member to tribal member, tribal member to non-tribal member, and non tribal member to non tribal member. The first type usually comes with less conflict, as they could be resolved internally without much fuss. The second type is the most common one and is often also the most complicated one, as its procedures can get very opaque. These often include supreme court decisions, such as some of the ones found in the timeline of events below. Throughout the last centuries there are still new problems that need to be coped with by the Supreme Court, usually on the rights of non-member on tribal reservations. The last type, with both sides of the legal battle being non-members, is relatively rare, and the only well-known case up to now is the “Strate” case<sup>20</sup>. This type also includes Supreme Court rulings, which is a nuisance to the tribes.

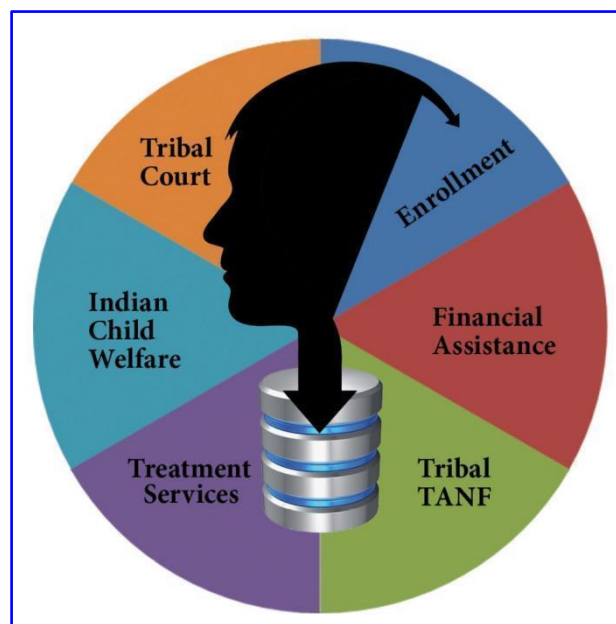


Figure 3: The need and necessities to have tribal courts<sup>21</sup>

<sup>20</sup> “Strate v. A-1 Contractors, 520 U.S. 438 (1997).” *Justia Law*, <https://supreme.justia.com/cases/federal/us/520/438/>.

<sup>21</sup> Indianz. “Mashantucket Pequot Tribal Nation Seeks to Revive Gaming Lawsuit.” *Indianz*, <https://www.indianz.com/Z.png>, 17 Oct. 2018, <https://www.indianz.com/IndianGaming/2018/10/17/mashantucket-pequot-tribal-nation-seeks.asp>.

## Mashantucket Pequot Reservation

Mashantucket reservation is a tribe fully equipped with the resources needed for a decent life, including full access to clean water and a good source of income. It contains a very strong governmental body including chair, secretary, treasurers and councilors, and has its very own special tribal court system. It has a very comprehensive judicial system which benefits its tribal members.

Quite obviously, the Mashantucket Tribal Court provides its judicial forum for the resolution of civil disputes that arise within the Mashantucket community. What differs from the other tribes' courts is that in 1992<sup>22</sup>, it developed an American style judicial system and since then, its judgments have been entered as valid in every state that has considered them.<sup>23</sup>



Figure 4: Inside the Mashantucket Court<sup>24</sup>

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<sup>22</sup> “The History of the Tribal Courts.” *The Mashantucket (Western) Pequot Tribal Nation*, <https://www.mptn-nsn.gov/tchistory.aspx>.

<sup>23</sup> “Mashantucket Pequot Tribal Court.” *The Mashantucket (Western) Pequot Tribal Nation*, <https://www.mptn-nsn.gov/tribalcourt.aspx>.

<sup>24</sup> Rosenlund, Tracey. “Tribal Court Importance in the USA.” *Handel Information Technologies*, Tracey Rosenlund [https://www.handelit.com/Wp-Content/Uploads/2022/06/Handel\\_25\\_Logo\\_Web\\_156-1.Png](https://www.handelit.com/Wp-Content/Uploads/2022/06/Handel_25_Logo_Web_156-1.Png), 24 June 2020, <https://www.handelit.com/breaking-down-barriers-by-integrating-systems-recording/>.

## The importance of the tribal courts and its tribal sovereignty

As provided by the US constitution, the tribes and their courts have a very unique status across America, as they have certain levels of independence and jurisdiction to make their own rules and procedures, and normally would be on the Native American peoples sake, such as to make conflicts occurring inside the tribe much easier to cope with and to legally tackle. So, as they are granted this unique status as sovereign nations, they are considered and acknowledged to have the privileges and immunity that another state's responsibilities, powers, limitations, and obligations also apply to. Therefore, tribal courts essentially serve as a protection to this sovereignty and their special identity, doing their part to keep the tribes a peaceful place.

## Why are tribal courts needed

The dispute that exists from time to time in the US is whether the presence of tribal courts is really beneficial and needed to improve tribal members' lives. The most important reason for tribal courts to exist is that the tribe members' tribal heritage, culture and identity are vastly distinct and are federally recognized, since they are sovereign nations.<sup>25</sup> This creates the need for difference, the need to have a different type of court that offers extra cultural protection to all the tribal members. This sovereignty recognizes a tribe's claim to independent authority, identity, and citizenship and hence offers all the tribal members the feeling of being under protection and safe. Without this recognition, all the tribal nations would merely have the status of a normal cultural group with no further status or support. If that becomes that case, then the various states and the federal government would have no special obligation to reach out to the needs and special requirements that the tribes may otherwise have, which will give them a hard time.

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<sup>25</sup> *Tribal Courts: Custom and Innovative Law - Core.* <https://core.ac.uk/download/pdf/151604437.pdf>.

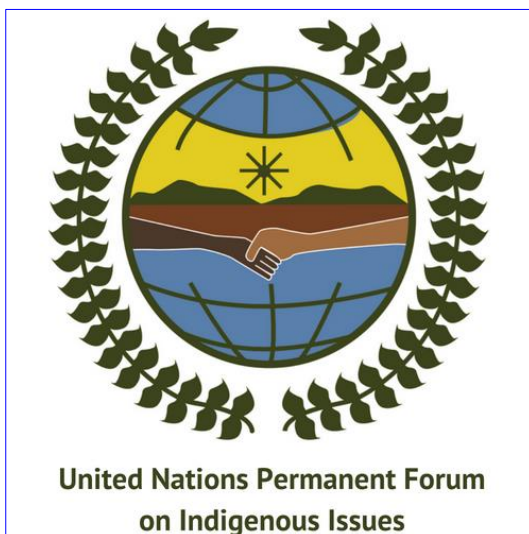


## The economic independence of the tribes

The tribal courts require a lot of capital supply in order to fulfill its needs. Therefore, a more independent and stable source of income is absolutely necessary. Most of the tribes in the United States currently have found ways to flourish and earn money by various methods. The most distinct and relatable methods came out following the Indian Gaming Regulatory Act of 1988<sup>26</sup>, which allowed tribes to create gambling establishments and make money from the casinos on their reservations. Not only did the revenues benefit the tribe and the court facilities, but also established a stronger and more productive economic relationship with the state in which the reservation is located.

The revenues from the casinos in the reservations are exempt from taxes, due to the sovereign nature of these tribes, making states unable to tax the tribes even if they wanted to.

## The significance of the United Nations in the tribal affair



The United Nations has never directly linked itself with trying to strengthen tribal courts. Yet, it has addressed numerous times to the well-being of all tribal members. The United Nations Permanent Forum on Indigenous Issues was formed on 28 July 2000, by resolution 2000/22<sup>27</sup> and since then, it has been trying to reach out to the concerns and needs of indigenous people from tribes around the world. The UN general assembly has been consistently passing

resolutions on the topic of tribal affairs and indigenous matters once every single year in

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<sup>26</sup> "ITG FAQ #7 Answer-What Is the Indian Gaming Regulatory Act?" *Internal Revenue Service*, <https://www.irs.gov/government-entities/indian-tribal-governments/itg-faq-7-answer-what-is-the-indian-gaming-regulatory-act>.

<sup>27</sup> "Permanent Forum on Indigenous Issues for Indigenous Peoples." *United Nations*, United Nations, <https://www.un.org/development/desa/indigenouspeoples/about-us/permanent-forum-on-indigenous-issues.html>.

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December under the title of “Rights of indigenous peoples”. One example is its resolution A/RES/76/459 passed on the 16<sup>th</sup> of December 2021 which urged governments to raise awareness on the matter in all sectors of society, especially under the negative influence of COVID-19. This resolution, along with all the previous ones starting from A/RES/46/128 passed in December 1991, have all stressed the importance of tribal matters and contributed positively to the establishment of tribal courts.<sup>28</sup>

In September 2007, the United Nations General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples, which recognizes that they have important collective human rights in areas including self determination, spirituality, lands, territories as well as natural resources. It also sets out the bottom line for the life standard of indigenous people, which can serve as the basis for development of customary international law. This had a huge effect in urging individual member states’ governments, not only in America but also around the world to act in strengthening indigenous lives.

### Major countries and organizations involved

#### NARF (Native American Rights Fund)

The Native Americans Rights Fund plays an important role in helping tribes to develop. It is a NPO (Non profit organization). Its main job is to use existing laws and treaties to ensure that the US state and federal government live up to their legal obligation against Indian American Tribes. Since its founding in 1970<sup>29</sup>, it has contributed positively to the strengthening of tribes and their courts. The NARF works to achieve its five main goals: preserving tribal existence, protecting tribal natural resources, promoting Native American human rights, holding governments accountable to Native Americans, and developing Indian law.

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<sup>28</sup> “General Assembly Resolutions on Indigenous Peoples for Indigenous Peoples.” *United Nations*, United Nations, <https://www.un.org/development/desa/indigenouspeoples/about-us/general-assembly-resolutions-on-indigenous-peoples.html>.

<sup>29</sup> “About Us.” *Native American Rights Fund*, 10 June 2022, <https://www.narf.org/about-us/>.





## NCAI (National Congress of American Indians)

The NCAI has the utmost importance in keeping all the tribes in America, including Alaska, culturally safe. It is generally an American Indian and Alaskan Natives' Right organization. Since its founding in 1944<sup>30</sup> It has always been acknowledged to represent the tribes. It does that by cooperating with tribes and serving their broad interests. As its motto says, "To be the unified voice of tribal nations' ', its most important contribution to the tribes is its resistance to governmental pressure for termination of tribal rights and especially its attempts to assimilate tribal people, which was during the Termination Era starting from 1953. Through their efforts, they have been protecting and advancing tribal governance, fast-forwarding economic development, and educating US citizens on the tribal matter.

## The United States of America

As the United States is where most of the tribal courts in the world are located, it is clearly the most important relevant country on the topic. With 574 federally recognized tribes across the country, it has, on the land of North America, the biggest population of Native people that have been living since thousands of years ago. Therefore, the federal government of the United States plays an important role in determining the legal status and the fate of the tribes.

There have been unaccountable policies against Native Tribes adopted by the federal government. The policies, such as the *Oliphant v. Suquamish* case and the *United States v. Mazurie*, builds up to a huge set of laws that determine the identity of the native tribes. For a very long time, the federal government's attitude on the topic had been changing. During some periods it attempted to reduce the status of Tribes in America and assimilate the tribal population into the general population, as can be seen in a recent Supreme Court Ruling in June 2022. This was done to give more jurisdictional power to the states over certain crime cases in the tribes. A famous set of policy against tribal sovereignty is called "Indian termination policy" from the 1940s to the 1960s, starting

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<sup>30</sup> [www.browsermedia.com](https://www.browsermedia.com), BrowserMedia -. "About NCAI." NCAI, <https://www.ncai.org/about-ncai>.



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from The Kansas Act of 1940<sup>31</sup>, where there were a series of laws and practices intending to assimilate the Native Americans into the mainstream culture, including the dismantling tribal sovereignty as well as jurisdictional terminations.<sup>32</sup>

But, generally, the US constitution gives fair protection to the Tribal members and natives, since it admits its distinct governments, so generally the tribes have the same powers as federal and state governments to regulate internal affairs. In addition, in a few states, tribal courts have the power to prosecute almost all types of crimes (including murder, drug abuse, burglary, child abuse etc) occurring on tribal land, including California, Minnesota and Oregon, where a decent number of tribes are located.

### South Africa

The traditional tribal courts also have their footprints in South Africa where there are indigenous populations living there, mostly in rural areas. The constitution approves their authority and special jurisdiction, which was also supported by former president of South Africa Nelson Mandela.

Recently, there has been a debate in a country about whether they should be integrated into the national legal system, which also caught the attention of the Council on Foreign Relations.

As of now, there are strong arguments both for and against a proposed legislation to normalize traditional courts. Some politicians against integration state that tribal courts give people living in rural areas easier access to justice.<sup>33</sup>

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<sup>31</sup> McKAY, Circuit Judge. "Iowa Tribe of Indians v. Kansas." *Legal Research Tools from Casetext*, 2 Apr. 1986, <https://casetext.com/case/iowa-tribe-of-indians-v-state-of-kan>.

<sup>32</sup> "Congress Seeks to Abolish Tribes, Relocate American Indians - Timeline - Native Voices." *U.S. National Library of Medicine*, National Institutes of Health, <https://www.nlm.nih.gov/nativevoices/timeline/488.html>.

<sup>33</sup> "Guest Post: Tribal Courts in South Africa." *Council on Foreign Relations*, Council on Foreign Relations, 5 July 2012, <https://www.cfr.org/blog/guest-post-tribal-courts-south-africa>.



## New Zealand

New Zealand still has indigenous Māori people living in the country. Therefore, there is a type of specialist court, called the Māori Land Court that hears matters relating to Māori land - land occupied by Māori people. The courts are protected under the Family Protection Act 1955, Law Reform Act 1949 as well as Government Rounding Powers Act 1989.<sup>34</sup> Its aim is for the general land to be retained in the hands of its owners and for it to be able to develop effectively.<sup>35</sup> This type of a court deals mostly with ownership and management of Maori Land as it is a judicial forum to interact with other owners, rather than dealing with crime cases.

## Botswana

Botswana has a customary court system (traditional justice) that works parallel to the formal court system. It was approved, protected and established by the Minister of Local Government in terms of Customary Courts Act 1974<sup>36</sup>. Those customary courts, which are headed by presidents, operate in the main urban centers. They handle mostly minor offenses occurring in the country such as land and marital matters. There, the tribal judges are appointed by the tribal leader or are elected by the tribal community.

## Malawi

Since there are 10 major indigenous ethnic groups in Malawi, tribal courts are necessary for the smooth running of the communities. Malawi has recently undertaken a process to review its court structures, and has a quite special tribal court system. These courts are mostly at the village level, they handle 80% to 90% of all the disputes in indigenous matters, usually concerning family disputes, land disputes and property

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<sup>34</sup> "Māori Land Court Te Kooti Whenua Māori." *Māori Land Court | Māori Land Court*, <https://maorilandcourt.govt.nz/>.

<sup>35</sup> "The Māori Land Court." *Community Law*, <https://communitylaw.org.nz/community-law-manual/chapter-2-maori-land/the-maori-land-court/>.

<sup>36</sup> *Policy Framework on the Traditional Justice System under the Constitution*. [https://www.gov.za/sites/default/files/gcis\\_document/201409/2008tradcourtspfirmw.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/2008tradcourtspfirmw.pdf).



matters. This largely alleviates the pressure on court centers, and only when the cases cannot be resolved in these customary courts, would they be referred to relevant court centers.

### India

India does not have a tribal justice system, however, it does have a similar set of traditional courts to resolve civil matters. These courts were established as India has a high population, as well as high rate of poverty, so the poor often find it difficult to prosecute or defend the case due to the high cost of going to a formal court. For this reason, the Lok Adalat system (People's court) was created to provide legal service to the less-affluent. Initially starting in March 1982, now these courts are all over the country, protected by the Legal Services Authorities Act 1987<sup>37</sup>, ensuring that all the services promote justice on the basis of equal opportunity. With this simple setup, many civilians are able to receive court services without much delay.

### Ghana

The customary traditional justice systems in Ghana are guaranteed and protected by the Chieftaincy Act of 1970<sup>38</sup>. Despite the Chieftaincy being recognised, the traditional court systems ceased to exist after Ghana's independence. The Chieftaincy Institution, though do not have judicial functions, the chiefs still obtain considerable respect and authority locally. With this authority, the traditional leaders and chiefs settle many land disputes and domestic conflicts between certain citizens. As an LEDC country, many people and political leaders in Ghana seek the reintroduction of traditional courts due to the high costs of access to regular courts. Even though the Ghanaian Constitution does not officially recognise the existence of traditional tribes, the influence and power of

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<sup>37</sup> *Policy Framework on the Traditional Justice System under the Constitution.*  
[https://www.gov.za/sites/default/files/gcis\\_document/201409/2008tradcourtsprfmw.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/2008tradcourtsprfmw.pdf).

<sup>38</sup> *Ibid*



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traditional chief leaders have nevertheless extended to solving matters concerning property and family disputes.

### Australia

Aboriginal (indigenous) population in Australia felt that they had limited input into the Australian judicial process. They also believed that the courts were unwelcoming and culturally alienating for them. Therefore, what is known as the Indigenous Urban Courts were created in 1999<sup>39</sup>. It represents the beginning of involving indigenous members in the court process against urban Indigenous offenders. Since then, there have been new Justice practices established, such as for a remote indigenous community. Through this process, the problem of the over-representation of Indigenous People in the criminal justice systems was resolved, and helped increase indigenous participation, assisted by the Royal Commission into Aboriginal Death in Custody.

### Timeline of events

<u>1778</u>	Treaty of the Delawares, which can be seen as the first time US government negotiated with Native Indians in America
<u>1883</u>	The establishment of the first tribal court system in the USA, in which the Ex Parte Crow Dog case was made, which included the killing of a tribal member
<u>1934</u>	Indian Reorganization Act, a legislation that dealt with the problem of Indian Native identities and status in America

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<sup>39</sup> *Policy Framework on the Traditional Justice System under the Constitution.*  
[https://www.gov.za/sites/default/files/gcis\\_document/201409/2008tradcourtsprfmw.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/2008tradcourtsprfmw.pdf).



<u>1953</u>	Enactment of Public Law 280, which granted certain states criminal jurisdiction over Indians on reservations
<u>1974-1975</u>	The case of United States v. Washington, or else later known as the Boldt Decision, which gave certain tribal members rights to fish off reservation
<u>21 January 1975</u>	Court Ruling of United States v. Mazurie, in which non-Indian defendants operated a bar on a privately owned land within boundaries of Indian reservation
<u>1975</u>	Indian Self-Determination and Education Assistance Act was authorized
<u>6 March 1978</u>	Oliphant v. Suquamish Indian Tribe to remove criminal jurisdiction over non-Indians
<u>1980</u>	Washington v. Confederated Tribes of Colville Indian reservation, which states that tribes are dependent only on the federal government
<u>24 March 1981</u>	Ruling of Montana which prohibited hunting and fishing by nonmembers in Crow tribe of Montana as well as authority over non-Indians on fee land within reservation
<u>1997</u>	Strate v. A-1 Contractors, a Supreme Court case on tribal courts' adjudicatory authority over civil matters between nonmembers on Indian country highways

<u>1998</u>	CIRCLE project, an initiative that sought improvement for the tribal courts and funding
<u>28 July 2000</u>	Formations and inauguration of the United Nations Permanent Forum on Indigenous Issues, where the UN for the first time directly related itself with Indigenous people around the world
<u>2001</u>	Nevada v. Hicks, a case related with the tribal courts' jurisdiction when a state official / politician is sued by a tribal member <sup>40</sup>
<u>2001</u>	Atkinson Trading Co. V. Shirley, a Supreme Court case on the Tribes' taxing authority on nonmembers of the tribe.
<u>2010</u>	Tribal Law and Order Act of 2010, which was signed by President Obama, expands the punitive abilities of the tribal courts such as allowing them to increase jail sentences
<u>2016</u>	Dollar General Corp. V. Mississippi Band of Choctaw Indians
<u>August 2017</u>	Cherokee Freedmen controversy, a dispute on descendant tribal membership

<sup>40</sup> Nevada v. Hicks, <https://www.oyez.org/cases/2000/99-1994>.



## Previous attempts to solve the issue

### Comprehensive Indian Resources for Community and Law enforcement (CIRCLE) project by US department of Justice (USDOJ)

This was a major move to strengthen the tribal courts in the United States, acting as an experiment to see how federal funds best assist tribal nations. It took place in 1998. Several agencies within the Department of Justice got in contact and cooperated with Northern Cheyenne Tribe, Oglala Sioux Tribe and Pueblo of Zuni<sup>41</sup> to strengthen the Natives' justice systems. This project focused mainly on bettering each and every single minor component of the court systems to improve the court justice as a whole, in order to address crime and social problems. In the end, through different means including investment, utilizing resources and law enforcement, it improved the justice systems of these tribes as a whole and massively reduced crime rates. It also provided USDOJ with the information that sustainability is something that needs to be tackled with when dealing with tribal issues.

The project set a precedent for all the preceding attempts to strengthen tribal court systems and made it easier and simpler for later similar initiatives to be set up to improve tribal justice in order to ultimately reach tribal sovereignty.

### The American Rescue Plan (ARP) Act against Covid-19

The pandemic exerted huge economic pressure on all the tribes, undoubtedly. Therefore, economic aid from the governmental agencies and departments became essential. One example was the American Rescue Plan Act, which was signed by President Biden on March 11, 2021<sup>42</sup>, funding the tribes to address the pandemic's damaging impacts on Indian Countries. The money was given to BIA and it was

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<sup>41</sup> "The Circle Evaluation: How Can Federal Funds Best Assist Tribal Nations?" *National Institute of Justice*, <https://nij.ojp.gov/topics/articles/circle-evaluation-how-can-federal-funds-best-assist-tribal-nations>.

<sup>42</sup> Haagensen, Erik. "American Rescue Plan." *Investopedia*, Investopedia, 19 July 2022, <https://www.investopedia.com/american-rescue-plan-definition-5095694>.





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responsible for disbursing the 900 million USD to all the Indian tribes. Part of the money would go to Tribal Priority Allocation (TPA) and its reorganization, which is vital for the funding and repairing of the tribal courts.

### Coordinated Tribal Assistance Solicitation

The Coordinated Tribal Assistance Solicitation was established in fiscal year 2010<sup>43</sup> to function as a funding source for federally recognized tribes, due to the concerns from tribal leaders about the lack of flexibility in the grant process. Its aim is to allow tribes to develop a comprehensive and coordinated approach to public safety and victimization, which benefits the tribal courts as the funding effectively disbursed to over 2000 grants to tribes and Alaska natives, totaling almost 1000 million, and could be used by tribal justice systems.

### Center for World Indigenous Studies

This NGO (Non-governmental organization) is a non-profit organization established in 1979<sup>44</sup>, based in Washington. Its aim is to be able to investigate all aspects of indigenous people and their living conditions to better understand the ideas and to dedicate to the knowledge of indigenous peoples. While it does not contribute directly to any tribal courts, it managed to raise public awareness throughout the world, in order to achieve their ultimate aim of advancing indigenous rights. It lets normal citizens a gateway to look at the indigenous matters. Up to now, there have been over 27 laws and regulations drafted due to them, which is an incredible feat.

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<sup>43</sup> "50 Years of Building Solutions, Supporting Communities and Advancing Justice: 2010 Coordinated Tribal Assistance Solicitation." *Office of Justice Programs*, <https://www.ojp.gov/ojp50/2010-coordinated-tribal-assistance-solicitation>.

<sup>44</sup> *CWIS - Our Story*, <https://www.cwis.org/our-story/1990-1979/#tabs>.



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### Tribal Justice System Infrastructure Training and Technical Assistance Initiative

This initiative (TJSI TTA)<sup>45</sup> was designed to assist tribes to plan and implement processes for renovation, expansion and replacing of tribal justice facilities, including multipurpose justice centers, courts, and civil departments. This was initiated under the Bureau of Justice Assistance (BJA), which is a department aimed to provide leadership to local criminal justice programs. The initiative began at the start of fiscal year 2021 to improve civil justice matters in the tribes, it also aided the courts so that they could deal more effectively with legal cases.

### Relevant UN resolution, events, treaties, and legislation

#### World Conference on Indigenous peoples (WCIP)

There was a World Conference on Indigenous peoples (WCIP) that was held on 22 September 2014<sup>46</sup>, which could be seen as a step to a stronger relationship between UN officials and Tribal members. This was a two-day high plenary meeting, in which indigenous people around the world, including tribal officials from the USA, joined the meeting with the member states. In the talk, UN officials, member states, tribal members as well as NGOs (Non profit organizations) shared their perspectives and opinions for the best practices on the realization of the indigenous rights.

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<sup>45</sup> "FY 2021 Tribal Justice System Infrastructure Training and Technical Assistance Initiative." *Bureau of Justice Assistance*, <https://bjaojp.gov/funding/opportunities/o-bja-2021-49002>.

<sup>46</sup> "World Conference on Indigenous Peoples for Indigenous Peoples." *United Nations*, United Nations, <https://www.un.org/development/desa/indigenouspeoples/about-us/world-conference.html>.



### Three major bodies on Indigenous Issues (UNPFII, Expert Mechanism, Special Rapporteur)

In addition to The Permanent Forum on Indigenous Issues, there are two other main bodies of the UN that deals with tribal and indigenous issues. These are the Special Rapporteur on the rights of indigenous peoples and the Expert Mechanism on the Rights of Indigenous Peoples. Established in 2000<sup>47</sup>, the UNPFII, as an advisory body to the Economic and Social Council (ECOSOC), focuses on advice and coordination on tribal issues. It also has the mandate to deal with indigenous issues related with economic and social development, as well as culture and environment. In addition, as the most influential UN body on indigenous matters, it also disseminates information across the world. The Special Rapporteur works on the part of promoting “constructive agreements between states and tribes”. The Expert Mechanism, being a subsidiary body of the Human Rights Council, suggests proposals for consideration and approval by the council. The three bodies all work in harmony in solving the question on strengthening tribal courts.

### UN Declaration on the Rights of Indigenous Peoples (UNDRIP)

Adopted in 2007 by the General Assembly through a resolution A/RES/61/295<sup>48</sup>, with only four votes against, assisted by OHCHR (Office of the High Commissioner for Human Rights), the declaration set a universal standard for indigenous people and their daily life quality. It was a comprehensive document in dealing with indigenous population, and promised better civil protection to native people around the world. It establishes a framework of minimum standards for survival, well-being and dignity of indigenous people. The declaration in addition ensures their distinct culture and self-determination, to allow indigenous tribes to pursue their socioeconomic development. This declaration

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<sup>47</sup> “Permanent Forum for Indigenous Peoples.” *United Nations*, United Nations, <https://www.un.org/development/desa/indigenouspeoples/unpfii-sessions-2.html>.

<sup>48</sup> “United Nations Declaration on the Rights of Indigenous Peoples for Indigenous Peoples.” *United Nations*, United Nations, <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.



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is a part of a bigger set of General Assembly Resolutions on Indigenous Peoples, which focused on all aspects of tribal advancement. The declaration was followed by a set of System-wide action plan (SWAP) to further enforce the contents of the declaration.

### Indigenous Peoples Assistance Facility (IPAF) and UN Voluntary Fund

The objective of Indigenous Peoples Assistance Facility<sup>49</sup> is to strengthen indigenous peoples' communities by financing and funding small-projects which foster the tribes' self-development. It funds between 20000 to 50000 USD to each individual project started by tribal communities. This is essential to tribal communities as it allows the tribes to develop without exterior interference. It provides financial aid to tribes based on their need, so money is not wasted in this process. This facility works with UN to provide service to the tribes around the world. In addition, a fund called the UN Voluntary Fund for Indigenous Peoples also exists to award grants to representatives of indigenous peoples' organizations to participate in Permanent Forum sessions.

### International Year of Indigenous Languages (IY2019)

In 2016, the General Assembly proclaimed the year of 2019<sup>50</sup> to be the International Year of Indigenous Languages and together invited UNESCO as the lead agency of the year. Through this year, the UN highlighted the need to raise attention and awareness on indigenous matters. They urged people at national level and international level to start preserving tribal languages, as tribal inheritance has become such a culturally important part of earth. With this whole-year event, more citizens got educated on indigenous peoples and their tradition. It was another move by the UN to make indigenous matter worldwide and to draw people's attention.

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<sup>49</sup> "Indigenous Peoples Assistance Facility." *IFAD*, <https://www.ifad.org/en/ipaf>.

<sup>50</sup> "International Year of Indigenous Language." 2019, <https://en.iyil2019.org/>.



## The Indigenous and Tribal Peoples Convention Treaty 1989 (C169)<sup>51</sup>

It is an International Labor Organization Convention (LBO). Is is the only treaty that UN has up to now that is open to ratification and deals exclusively with indigenous and tribal issues. It is one of the most major international convention concerning indigenous and tribal rights. This treaty acts as a forerunner for the later adopted Declaration on the Rights of Indigenous Peoples, and is a representation of the beginning of the UN dealing with indigenous peoples at the beginning of the 1990s decade. It promotes access of decent work to tribal members and tribal self-empowerment.

## Possible Solutions

### Making use of WEB3

The appearance of decentralized internet and cryptocurrency following Satoshi Nakamoto's invention of Bitcoin in 2008 presents a new possible solution on strengthening tribal courts and especially through economic means. In the past few years, WEB3 has been progressively gaining public interest and it is now believed to be the next-generation of the digital world. WEB3 is defined as an idea for a new iteration of the web which incorporates concepts such as decentralization, blockchain technologies, and token-based economics.

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<sup>51</sup> "Indigenous and Tribal Peoples Convention, 1989." *Wikipedia*, Wikimedia Foundation, 27 June 2022, [https://en.wikipedia.org/wiki/Indigenous\\_and\\_Tribal\\_Peoples\\_Convention,\\_1989](https://en.wikipedia.org/wiki/Indigenous_and_Tribal_Peoples_Convention,_1989).





Figure 5:WEB3 concept<sup>52</sup>

## Funding

The convention way of funding through governmental approving such as aforementioned is to an extent effective, but it lacks efficiency and often needs to go through a complicated process until the final disbursement through e-banking. Using WEB3, this process will become much simpler and can essentially take over the normal way of funding. It will be done through a decentralized platform (does not have any governmental organization or intermediaries in control), with an initiative to raise digital money and further transact to the tribes. The tribal governments can also set up a digital wallet to allow any cryptocurrency owners to donate money to the wallet address, using Bitcoin, Ethereum and Polkadot etc. This wallet is easy to create and does not require much capital for tribal governments to set up. When they've collected the cryptocurrencies, they can choose to convert it to paper money. This process is safer and faster than bank transaction due to the code encryption that crypto blockchains have.

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<sup>52</sup> "What Is web3? - Blog - Certik Security Leaderboard." *CertiK Blockchain Security Leaderboard*, <https://www.certik.com/resources/blog/Web3>.

### Community and Awareness

Public awareness is essential in improving tribal reservations and their justice systems. A feature of the WEB3 can be a boost to the already existing NGOs trying to spread awareness. This feature can be more efficient than advertisements, petitions, or articles. Decentralized Autonomous Organization (DAO) is a relatively new type of community that is trust-based, not monitored by government, underrated, and works together towards a common goal. The members propose initiatives and ideas for the world to advance forward. A DAO, in this case, can be created aimed to raise awareness on tribal justice matter, by posting articles and news that educate the citizens. The most obvious advantage of having a DAO is that it reaches out to the younger people and the next gen far better than websites. By establishing a DAO community, the younger people are more likely going to gain interest in the matter and hence even participate in them, as DAO members communicate in newer platforms such as Discord rather than Facebook.

### Additional opportunities for the United Nations and NGOs

#### UN specialized agency

A small, efficient and specialized agency could be set up within bigger organizations such as GA6 Legal Committee. It will be mainly focused on monitoring and harmonizing all projects and initiatives that is set up by either the UN itself or the respective member states. It will be serving to ensure the progress and in addition make sure the effective usage of capital by cooperating with ECOFIN. The agency will send UN officials to indigenous conferences and talks to monitor the progress of any projects, and would communicate with the members states' governments to request monthly or annual reports that present to the UN the progress that is being made. Through this monitoring, the UN can gain knowledge on the more useful projects and ideas on strengthening tribal courts and hence discuss with the International Monetary Fund to provide more aid for the specific project.



Simplifying Tribal Court Procedures with better legislation

As aforementioned in the background information, the problem that a large number of tribal courts have is that the individual governments lack legislation that clarify the jurisdictional power of tribal courts. Therefore, there are plenty of situations that can happen in a tribal reservation that are not included in any previous rulings or laws. When this happens, the case often goes to the Supreme Court which slows down the entire process. The UN, as the largest internationally recognized body, can attempt to urge the governments of the countries which have a lot of tribes to improve legislation on tribal matters, especially justice systems. Through this process, the government would specify tribal jurisdictional power, such as against non tribal members, a set a clear boundary between the authority of tribal justice systems and the conventional courts. This not only benefits the tribes as they can more efficiently deal with crime cases, but also benefits assimilated people. The NGOs can also help in this matter as they can reach out to the tribes and the public to gain information on the matter and inform the governments along with their findings.

Decreasing crime rates in tribal reservations

A lot of times, the tribal courts cannot function to its maximum potential due to the fact that the crime rate is skyrocketing in the tribal community because of the low civil happiness index. This factor causes congestion in court processes and slows down court development. The United Nations can investigate into this matter and consult tribal governments in order to know the aspect of development that they are most in need. Through this method, the UN can help, along with the IMF, NGOs and other donors to economically aid the tribes. In most cases nowadays, it is the sustainability that the tribes need. This improves the prosperity of the tribal reservations as a whole and further decreases crime rates due to the fact that tribal members would live a more decent life. As crime rates decreases, less pressure is given to the courts, hence maximizing tribal courts' potential.





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