

Quick Reference Guide to

# Indigenous Rights in the United States of America

## A Three-Track Analysis

- TRACK 1** How US Courts Habitually Treat Indigenous Rights  
**TRACK 2** How Indigenous Rights Are Viewed Under International Law  
**TRACK 3** Reconciliation, Tensions, and Irreconcilable Differences

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*Study of Crystal Salazar*

### Purpose and Scope

This guide analyses the legal framework governing indigenous rights in the United States across three distinct tracks. Track 1 examines how US federal and state courts habitually apply these rights in practice — including their well-documented limitations and failures. Track 2 examines the same rights as understood under international human rights law and instruments, including UNDRIP, ILO Convention 169, and general customary international law. Track 3 identifies where the two tracks converge, where they can be partially reconciled, and where they are genuinely and irreconcilably in conflict. This analysis directly supports the IAJ investigation into whether Crystal Salazar's rights — including any indigenous rights — were honoured or violated.

### How to Read This Document

Track 1 sections are marked with a green banner. Track 2 sections are marked with a blue banner. Track 3 — the reconciliation analysis — is marked with a purple banner. Irreconcilable differences are highlighted in red throughout. The master comparison table in Track 3 provides a structured side-by-side reference for all major topics.

## TRACK 1 How US Courts Habitually Treat Indigenous Rights

*Federal and state court doctrine, practice, and the gap between legal entitlement and judicial reality*

## T1-I. THE PLENARY POWER DOCTRINE — CONGRESS AS ABSOLUTE SOVEREIGN

The single most consequential doctrine shaping how US courts treat indigenous rights is the Plenary Power Doctrine. Under this doctrine, Congress has near-absolute and largely unreviewable authority over Indian affairs. Courts have declined to subject congressional acts affecting tribal rights to the same constitutional scrutiny they would apply to laws affecting other groups.

### A. What Plenary Power Means in Practice

- Congress can abrogate — unilaterally break — treaty obligations with tribal nations without the consent of the tribe and without the same constitutional constraints that would apply to breaking treaties with foreign nations.
- Congressional acts abrogating tribal rights are not subject to Fifth Amendment takings analysis in the same way as other property deprivations, though *Tee-Hit-Ton Indians v. United States* (1955) held that aboriginal title lands could be taken without compensation.
- Courts apply the rational basis standard — the most deferential judicial review — to federal acts affecting tribes, meaning congressional legislation in the Indian affairs field is rarely struck down.
- The doctrine emerged from *Lone Wolf v. Hitchcock* (1903), in which the Supreme Court held that Congress could unilaterally abrogate treaty-protected land rights. The Court described congressional power as 'plenary and exclusive' — language that has endured for over a century.

*"The power exists to abrogate the provisions of an Indian treaty... [W]e must presume that Congress acted in perfect good faith in the dealings with the Indians of which complaint is made."*

— *Lone Wolf v. Hitchcock*, 187 U.S. 553, 568 (1903) — establishing near-unreviewable congressional power over tribal rights

### B. Judicial Reluctance to Review Congressional Indian Policy

US courts have consistently deferred to congressional judgments about Indian policy even when those judgments caused substantial harm. The political question doctrine, separation of powers concerns, and the historical paternalism embedded in federal Indian law have all reinforced judicial reluctance to second-guess legislation affecting tribal nations.

The practical consequence: indigenous plaintiffs face a structurally higher burden when challenging federal legislation than almost any other class of claimants. Courts that proclaim protective doctrines in theory frequently defer to Congress in practice when those protections conflict with federal policy.

## T1-II. THE TRUST RESPONSIBILITY — DOCTRINE VS. PRACTICE

## A. The Doctrine as Courts State It

On paper, the Trust Responsibility reflects the federal government's obligations in its dealings with tribal nations, and *Seminole Nation v. United States* (1942) articulated that the government's conduct toward tribes 'should be judged by the most exacting fiduciary standards.' Courts have affirmed the guardian-ward relationship and the principle that the government must act in good faith toward tribal interests. However, the doctrine as proclaimed on paper is substantially narrower in litigation than advocacy materials sometimes suggest.

The critical limiting principle, established in *United States v. Mitchell I* (1980), *Mitchell II* (1983), and reinforced in *United States v. Jicarilla Apache Nation* (2011), is that the Trust Responsibility does not impose a free-floating general fiduciary duty applicable to every governmental interaction involving a Native person. Enforceable trust duties require a specific statutory, regulatory, or treaty foundation, or a regime of federal control over identified tribal or individual Indian trust assets. Without that specific predicate, claims based on the Trust Responsibility are regularly dismissed.

## B. How Courts Actually Apply It

In practice, US courts have significantly narrowed the Trust Responsibility in three consistent patterns:

Limiting Pattern	How Courts Apply It in Practice
Requiring Specific Statutory Basis	Courts do not imply enforceable fiduciary duties from the general trust relationship alone. Following <i>Mitchell I</i> (1980) and <i>Mitchell II</i> (1983), and confirmed in <i>Jicarilla Apache Nation</i> (2011), courts require a specific statute, regulation, treaty provision, or federal control over identified trust assets before treating the government as subject to enforceable fiduciary duties. Without a precise legal predicate, trust responsibility claims are regularly dismissed — often before reaching the merits.
Sovereign Immunity	The United States has sovereign immunity from suit. Suits against the federal government for Trust Responsibility violations must find a specific congressional waiver of immunity. The Tucker Act and Indian Tucker Act provide limited waivers, but courts construe them narrowly and many meritorious trust claims are barred before reaching the merits.
Discretionary Function Exception	Even where a duty exists, courts frequently find that the manner of its exercise involved governmental discretion, shielding the United States from liability. The result is that acknowledged mismanagement of tribal assets — as in <i>Cobell</i> — can persist for decades before courts compel remediation.
Deference to Agency Interpretation	The Bureau of Indian Affairs (BIA) and other federal agencies administering Indian programmes receive judicial deference to their interpretations of ambiguous statutes and regulations, even where those interpretations are less protective of tribal rights than alternatives. Chevron deference (now replaced by <i>Loper Bright</i> , 2024) historically shielded agency decisions from meaningful review.

No Private Right of Action Under UNDRIP

Courts uniformly hold that international instruments, including UNDRIP, do not create judicially enforceable rights in US courts. Even where the US has endorsed UNDRIP, courts treat it as having no domestic legal effect. International standards are invisible in ordinary litigation.

*"The United States has charged itself with moral obligations of the highest responsibility and trust... Its conduct should be judged by the most exacting fiduciary standards."*

— **Seminole Nation v. United States, 316 U.S. 286 (1942)** — **the aspiration. What courts require in practice falls significantly short of this standard.**

## T1-III. ICWA — MANDATORY PROTECTIONS AND SYSTEMATIC NON-COMPLIANCE

### A. What ICWA Requires

ICWA (1978) imposes clear, mandatory obligations on courts and child welfare agencies: inquiry into Indian child status at the outset of proceedings; tribal notification; application of heightened evidentiary standards; active efforts before placement; placement preference hierarchies; and expert witness requirements. These are not aspirational — they are statutory commands.

### B. How Courts and Agencies Treat ICWA in Practice

Decades of research, litigation, and federal oversight have documented a consistent pattern of ICWA non-compliance across state court systems:

- Failure to inquire: Courts regularly proceed without asking whether a child is or may be an Indian child, despite the mandatory inquiry requirement. The failure is most common in urban and rural courts distant from reservation communities.
- Inadequate notice: Tribal notification is routinely late, incomplete, or omitted entirely. Tribes frequently learn of ICWA-covered proceedings only after placement has occurred, curtailing meaningful participation.
- Wrong standard of evidence: State courts apply preponderance of the evidence — the standard for ordinary civil proceedings — rather than ICWA's heightened standards (clear and convincing evidence for placement; beyond reasonable doubt for termination).
- Placement preference violations: ICWA's preference for placement with extended family, tribal members, or other Native families is routinely ignored without the required good cause finding. 'Good cause' exceptions have been stretched to become the norm rather than the exception.
- Inadequate expert witnesses: Courts regularly accept testimony from social workers or child psychologists who have no knowledge of tribal culture, customs, or child-rearing practices as satisfying ICWA's qualified expert witness requirement.
- Brackstad Problem (colloquial): Courts have sometimes allowed non-Native foster or adoptive parents to establish 'bonding' or 'best interests' arguments that effectively override ICWA's placement preferences — a result inconsistent with ICWA's structure.

**Hallmark Judicial Case: Brackeen v. Haaland (2023)**

In *Brackeen v. Haaland*, 599 U.S. 255 (2023), the Supreme Court upheld ICWA's constitutionality against challenges that it discriminated on the basis of race and violated the non-delegation doctrine. The Court held, 7-2, that ICWA's classification of 'Indian child' is political rather than racial — tracking tribal membership, a political category, not race. However, the splintered opinions and the powerful dissents signal ongoing judicial unease with ICWA's framework. The decision preserved ICWA but did not resolve state-court compliance failures.

**C. The Habitual Court Posture on ICWA**

Federal circuit courts of appeal have been relatively protective of ICWA where violations are raised on direct appeal. State supreme courts have been more variable. The dominant failure occurs at the trial court and child welfare agency level, where ICWA requirements are procedurally bypassed before any appellate oversight operates. By the time a violation is raised on appeal, placement and bonding have often occurred, and courts invoke 'best interests' analysis to resist reversal even when the statutory violation is clear.

**T1-IV. TRIBAL SOVEREIGNTY — RECOGNITION AND EROSION**

**A. The Sovereignty Courts Proclaim**

US courts formally recognise tribal nations as possessing inherent sovereignty — predating the Constitution, not derived from federal authority. The Marshall Trilogy established this. Courts regularly recite that tribes retain all aspects of sovereignty that Congress has not expressly abrogated. The most important modern affirmation of this principle is *McGirt v. Oklahoma*, 591 U.S. 894 (2020), in which the Supreme Court held 5-4 that the Creek Nation reservation had never been disestablished and that nearly half of Oklahoma remains Indian country for purposes of federal criminal jurisdiction. *McGirt* demonstrated that apparently settled questions of territorial sovereignty can be reopened and resolved in favour of tribal sovereignty by courts applying established treaty and statutory interpretation principles — even after more than a century of contrary state practice.

**B. The Sovereignty Courts Deny in Practice**

Despite *McGirt*, the gap between proclaimed sovereignty and judicial practice remains substantial. Courts have systematically narrowed tribal sovereignty in several consistent directions:

Sovereignty Area	Judicial Erosion in Practice
Criminal Jurisdiction Over Non-Natives	<i>Oliphant v. Suquamish Indian Tribe</i> (1978) stripped tribes of inherent criminal jurisdiction over non-Native defendants — a decision widely criticised as inconsistent with sovereignty principles and corrected only partially by VAWA 2013/2022. The result: non-Native perpetrators of violence against Native women and children faced near-impunity for decades.

Civil Regulatory Jurisdiction Over Non-Members	Montana v. United States (1981) established a restrictive test: tribes can regulate non-member conduct on fee lands within reservations only in two narrow circumstances. Courts have applied Montana expansively to deny tribal regulatory authority over non-members even where compelling tribal interests exist.
Tax Authority	State taxation of non-members in Indian country is permitted in many contexts under Court doctrine, weakening the economic base of tribal governance. Courts balance state and tribal interests rather than giving tribal authority presumptive weight.
Equal Footing with Other Sovereigns	Unlike states and the federal government, tribal nations cannot invoke certain constitutional protections directly. They are not, for example, protected by the 11th Amendment against suit in the same way states are. The asymmetry is routinely noted but rarely remedied.
State Jurisdiction Creep in Indian Country	Public Law 280 (1953) transferred criminal jurisdiction over Indian country to six states without tribal consent. Courts have interpreted PL-280 broadly in some jurisdictions, further eroding tribal jurisdictional exclusivity. Subsequent retrocession efforts have been slow.

## T1-V. HABITUAL COURT POSTURE: AN ANALYTICAL ASSESSMENT

The following section is not a statement of formal doctrine. It is a practical assessment of recurrent patterns in US judicial treatment of indigenous-rights claims, drawn from the interaction between doctrine, standards of review, available remedies, and recurring litigation outcomes. It is included to distinguish the rights courts recognise in principle from the way those rights are often treated in practice, and to assist the IAJ in understanding the gap between doctrinal entitlement and judicial reality.

Dimension	Habitual Judicial Posture
Deference to Congress	Near-absolute. Courts rarely strike down federal Indian legislation. The plenary power doctrine insulates congressional decisions from meaningful judicial review even where those decisions break treaty obligations or cause documented harm.
Deference to Agencies	High. BIA interpretations, IHS allocations, and BLM decisions affecting tribal lands and resources receive administrative deference. Courts resist de novo review of agency exercise of discretion over Indian affairs.
Treaty Rights	Mixed. Where treaty rights involve water, fishing, or hunting in states with strong competing interests, courts have sometimes enforced them robustly (United States v. Washington, the Boldt Decision, 1974). In other contexts, courts find implied abrogation or allow state regulation to encroach.

ICWA and Child Welfare	Formally protective at the appellate level; systematically under-enforced at the trial level. State courts have a documented compliance problem that federal courts have been slow to address structurally.
Remedies for Historical Wrongs	Deeply reluctant. Courts have consistently declined to apply retrospective remedies for historical dispossession, forced assimilation, and cultural destruction, treating these as political questions or as barred by sovereign immunity, statutes of limitations, or laches.

**Key Implication for the Salazar Investigation — Track 1**

Under Track 1, if Crystal Salazar's indigenous status can be established, she had specific legal rights in US courts — particularly under ICWA if child welfare proceedings affected her. Those rights were mandatory and enforceable. The more difficult question is whether courts and agencies in fact applied them, given the documented pattern of ICWA non-compliance and the gap between doctrinal protection and judicial practice. Track 1 analysis must therefore distinguish between what courts should have done under binding federal law and what courts habitually do in practice.

**TRACK 2 International Law and Treaty Standards**

*How indigenous rights are understood and protected under international human rights law, UNDRIP, ILO Convention 169, customary international law, and treaty body jurisprudence*

**T2-I. THE INTERNATIONAL FRAMEWORK: SOURCES AND HIERARCHY**

International indigenous rights law draws from multiple sources that together form a comprehensive normative framework. Unlike US domestic law, the international framework is grounded in universal human rights principles and treats indigenous rights as inalienable — not as privileges granted by a colonising state and revocable at legislative will.

Source	Status and Content
UN Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007)	The most comprehensive international instrument on indigenous rights. Not a binding treaty in the traditional sense, but a major normative instrument that informs international interpretation, advocacy, expert analysis, and treaty-body reasoning. Some of its principles are argued by scholars and international actors to reflect or contribute to customary international law in particular areas, but that proposition is article-specific and contested rather than uniform across the Declaration as a whole. 147 states voted in favour; 4 (including the US) initially voted against; all 4 later endorsed.
ILO Convention No. 169 (1989)	The primary binding international treaty on indigenous rights. Ratified by 24 states (not including the United States).

	Establishes rights to land, resources, culture, and self-governance, and requires FPIC before development or relocation affecting indigenous peoples. While the US has not ratified it, its provisions inform the interpretation of customary international law.
ILO Convention No. 107 (1957)	The earlier ILO instrument, now considered outdated due to its assimilationist approach. Superseded by C169 among ratifying states, but relevant historically as showing the evolution of international thinking.
UN Charter, Articles 1, 55-56	The foundational UN obligation on all member states to promote universal respect for, and observance of, human rights and fundamental freedoms without distinction as to race. Creates binding obligations on the United States as a Charter signatory.
International Covenant on Civil and Political Rights (ICCPR, 1966)	Binding treaty ratified by the United States in 1992. Article 27 protects the right of ethnic, religious, and linguistic minorities to enjoy their culture, practice their religion, and use their language. The Human Rights Committee has interpreted Article 27 to include indigenous peoples. Article 1 addresses self-determination.
International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966)	The US has signed but not ratified. Article 1 (self-determination) and Article 15 (cultural rights) apply to indigenous peoples under treaty body interpretation.
Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1965)	Ratified by the United States. CERD's Committee has issued multiple Concluding Observations to the US identifying violations of indigenous peoples' rights. Requires elimination of racial discrimination including against indigenous peoples; CERD Committee treats blood quantum requirements and plenary power doctrine as raising serious concerns.
Customary International Law	Certain indigenous rights — particularly the prohibition on genocide, the right to existence as a people, and the duty not to forcibly assimilate indigenous children — have attained the status of customary international law binding on all states regardless of treaty ratification. Violations of these norms may give rise to universal jurisdiction claims.

## T2-II. UNDRIP — THE INTERNATIONAL BENCHMARK IN DETAIL

UNDRIP establishes the most comprehensive articulation of indigenous rights under international law. Its 46 articles cover self-determination, land and resource rights, cultural and linguistic rights, protection from violence, participation in decision-making, and free prior and informed consent. The following are the provisions of greatest relevance to the Salazar investigation.

UNDRIP Article	Right Established	International Interpretation
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Article 1	Indigenous peoples have the right to the full enjoyment, as a collective and as individuals, of all human rights and fundamental freedoms.	The Human Rights Committee and CERD have interpreted this as requiring states to actively ensure indigenous peoples can exercise rights, not merely refrain from direct interference.
Article 7	Right to life, physical and mental integrity, liberty and security of person; right not to be subjected to genocide or violence.	The Inter-American Commission and Court on Human Rights have found violations of equivalent provisions where states failed to protect indigenous women and children from violence, including where jurisdiction gaps (like the Oliphant gap) allowed impunity.
Article 8	Right not to be subjected to forced assimilation or destruction of culture; states must provide effective remedies for assimilation policies.	International bodies treat forced assimilation as a violation of both UNDRIP and the Genocide Convention. Historic US assimilation policies, including boarding schools, are assessed against this standard.
Article 10	No forced relocation without free, prior and informed consent.	Interpreted strictly — resettlement without FPIC violates Article 10 regardless of government justification or compensation offered. The US treats this as aspirational.
Article 19	States shall consult with indigenous peoples in good faith to obtain their FPIC before adopting legislative or administrative measures affecting them.	Treaty bodies interpret 'measures affecting them' broadly to include child welfare legislation, criminal jurisdiction changes, and land use decisions. The US endorsement limits FPIC to an aspirational standard.
Article 22	Special attention to rights of indigenous elders, women, youth, children and persons with disabilities; states shall take measures to ensure protection from violence.	The Special Rapporteur on the Rights of Indigenous Peoples has found systematic failures by the US to protect indigenous women and children from violence, citing VAWA jurisdictional gaps and under-resourcing of tribal justice systems.
Article 33	Indigenous peoples have the right to determine their own identity and membership in accordance with their customs and traditions.	International bodies treat tribal self-identification and membership determination as within the sovereign authority of the indigenous people themselves, without state veto. Blood quantum requirements imposed by external legislation raise concerns under this article.
Article 40	Indigenous peoples have the right to access just, fair and impartial procedures for the resolution of conflicts, and to effective remedies.	International human-rights bodies have repeatedly expressed concern that US legal processes and remedies affecting indigenous peoples, including in child-welfare and jurisdictional contexts, may fall below international standards of fairness, participation, and effective remedy. The scope and specificity of those concerns varies across institutions and instruments.

<p>FPIC (Articles 10,11,19,28,29,32)</p>	<p>The principle of Free, Prior and Informed Consent runs throughout UNDRIP and is a strong international standard of participation, consultation, and consent, especially in matters affecting indigenous lands, resources, relocation, and cultural survival.</p>	<p>Many international bodies and commentators treat FPIC as requiring a process aimed at genuine consent and, in some contexts, as carrying powerful blocking effect. The precise legal force of FPIC across all contexts remains debated, and it is more accurate to describe it as a robust international standard rather than an automatic veto rule in every case. The US treats FPIC as aspirational.</p>
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## T2-III. SELF-DETERMINATION — THE INTERNATIONAL STANDARD

### A. Self-Determination Under International Law

Article 1 of both the ICCPR and ICESCR establishes that all peoples have the right to self-determination. The United States is a state party to the ICCPR, creating international obligations; domestic enforceability of these provisions in US courts is more limited. The Human Rights Committee has interpreted the self-determination provisions as applying to indigenous peoples.

UNDRIP Article 3 states that indigenous peoples have the right to self-determination and by virtue of that right freely determine their political status and pursue their economic, social and cultural development.

Under international law, self-determination encompasses:

- Internal self-determination: Genuine autonomy in governance, cultural expression, and resource management within the existing state. This is strongly supported in international law and is the most relevant dimension for indigenous peoples within established states.
- External self-determination: Recognised for peoples subject to colonial domination, alien subjugation, or racist regimes. Whether systematic denial of internal self-determination within established states can mature into a claim of external self-determination or remedial secession for indigenous peoples is a genuinely contested question in international law and should be presented as a debated scholarly and advocacy position, not a settled rule.
- Remedial secession: Some international scholars argue that where internal self-determination is systematically denied, external self-determination may crystallise. This position is not universally accepted and goes well beyond what US courts or most international bodies would currently endorse as a settled norm.

### B. The Jurisprudence of Treaty Bodies on US Indigenous Rights

Multiple UN treaty bodies have examined US compliance with international indigenous rights standards. The bodies discussed below have repeatedly raised serious concerns about US treatment of indigenous peoples, while the exact legal basis, emphasis, and specificity of their findings vary by institution and instrument:

Treaty Body	Key Findings Regarding the United States
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<p>CERD Committee (Concluding Observations)</p>	<p>Has repeatedly expressed concern about: (1) the Plenary Power Doctrine's compatibility with CERD's requirements; (2) blood quantum requirements as potentially discriminatory; (3) inadequate implementation of ICWA; (4) failure to provide indigenous women effective protection from violence; (5) incompatibility of Tee-Hit-Ton (no compensation for taking of aboriginal title lands) with the right to property.</p>
<p>Human Rights Committee (ICCPR Review)</p>	<p>Has found that the US fails to adequately protect indigenous peoples' right to culture under Article 27 ICCPR; that land dispossession without effective remedy violates the ICCPR; and that inadequate indigenous participation in decision-making affecting their rights falls short of the Covenant's standards.</p>
<p>Committee on the Rights of the Child (CRC)</p>	<p>Although the US has not ratified the CRC, the Committee has noted in its general observations that the removal of indigenous children from their families and communities without adequate safeguards violates children's rights standards — precisely the harm ICWA was enacted to address domestically.</p>
<p>Special Rapporteur on Indigenous Peoples (OHCHR)</p>	<p>Country reports on the United States have documented: inadequate protection of indigenous women from violence; ongoing jurisdictional gaps; failure to adequately implement FPIC before resource development on or near indigenous lands; and the need for a comprehensive National Action Plan on indigenous rights.</p>

## T2-IV. VIOLENCE AGAINST INDIGENOUS WOMEN AND CHILDREN — THE INTERNATIONAL STANDARD

The international human rights framework imposes specific and heightened obligations on states to protect indigenous women and children from violence. These obligations arise from multiple sources simultaneously:

- UNDRIP Article 22: States must take special measures to protect indigenous women and children from all forms of violence and discrimination.
- CEDAW (Convention on the Elimination of All Forms of Discrimination Against Women): The CEDAW Committee has issued General Recommendation No. 39 (2022) specifically addressing the rights of indigenous women and girls, finding that structural discrimination and impunity for violence constitute treaty violations.
- UN Sustainable Development Goals: SDG 5 (gender equality) and SDG 16 (peace, justice, strong institutions) are interpreted by UN bodies as requiring states to address epidemic violence against indigenous women.
- Inter-American System: The Inter-American Court of Human Rights and Commission have found violations of the American Convention on Human Rights and American Declaration on the Rights and Duties of Man where states failed to protect indigenous women from violence — a framework directly applicable to the United States as an OAS member.

*"The murder and disappearance of indigenous women and girls is a national crisis that requires immediate attention and a comprehensive, rights-based response."*

— **Special Rapporteur on the Rights of Indigenous Peoples, Report on the United States, A/HRC/36/46/Add.1 (2017)**

### International Assessment of the Oliphant Gap

The jurisdictional gap created by *Oliphant v. Suquamish* (1978) — which stripped tribal courts of criminal jurisdiction over non-Native offenders — has been repeatedly identified by international bodies as a violation of the state's obligation to provide effective protection and remedies for indigenous victims of violence. VAWA 2013 and 2022 partially addressed this, but international bodies note that the residual gap and under-resourcing of tribal justice systems continue to fall short of international obligations.

## T2-V. INTERNATIONAL ASSESSMENT: WHAT STANDARDS THE US FALLS SHORT OF

The following identifies recurring areas in which international bodies and standards raise serious concerns about US treatment of indigenous peoples. The exact legal basis, emphasis, and wording vary across institutions, and some positions represent strong treaty-body advocacy or scholarly consensus rather than universally settled norms:

Area	International Standard	US Practice Assessment
FPIC	Genuine consent required before state actions affecting indigenous rights.	US treats FPIC as aspirational; consultation (not consent) is the operative domestic standard. Multiple treaty bodies have identified this as a significant gap.
Land Rights	Historic dispossession is subject to remediation; aboriginal title warrants full compensation when extinguished.	Tee-Hit-Ton (1955): no compensation required for taking of aboriginal title lands. International bodies regard this as incompatible with the right to property under ICCPR and CERD.
Self-Determination	Internal self-determination must be substantive and genuine, including in law-making processes affecting indigenous peoples.	Plenary power doctrine allows Congress to override tribal self-governance without genuine consultation or consent. CERD and the Human Rights Committee have flagged this repeatedly.
Protection from Violence	States must provide effective protection and remedies; jurisdictional gaps that create impunity for perpetrators of violence against indigenous women are violations.	The Oliphant gap (partially remedied by VAWA) and chronic under-resourcing of tribal law enforcement create ongoing impunity. International bodies assess this as a treaty violation.

Child Welfare	Removal of indigenous children must be a last resort; cultural continuity must be maintained; tribal participation must be genuine.	ICWA represents a genuine effort at compliance, but systematic non-compliance at the state court and agency level falls below the international standard. The gap between ICWA's requirements and their implementation is itself an international concern.
Remedies for Historical Wrongs	Effective remedies, including restitution, rehabilitation, and non-repetition, must be available for historical violations.	US courts treat historical dispossession, forced assimilation, and boarding school abuses as non-justiciable political questions or time-barred. International law requires active remediation.

### Key Implication for the Salazar Investigation — Track 2

Under Track 2, Crystal Salazar's potential indigenous status engages not only domestic US rights but a broader set of international human rights obligations. International bodies have found that the US systematically falls short of these obligations in precisely the areas most relevant to her case: child welfare proceedings, protection from violence, and effective judicial remedies. The IAJ's investigation is entitled to assess her treatment against international standards even where US courts would not apply those standards directly.

## TRACK 3 Reconciliation, Tensions, and Irreconcilable Differences

*Where Track 1 and Track 2 converge, where they can be partially reconciled, and where they are genuinely incompatible*

### T3-I. OVERVIEW: THREE CATEGORIES OF RELATIONSHIP

The relationship between how US courts treat indigenous rights (Track 1) and how international law understands those rights (Track 2) falls into three distinct categories. Identifying which category applies to each specific right is essential for the IAJ's assessment of Crystal Salazar's case — it determines whether the applicable standard was violated under domestic law alone, international law alone, or both simultaneously.

Category	Description
Convergence	Areas where US domestic law and international standards align in both their requirements and their enforcement. Where the US meets the international standard in practice, not just on paper.
Partial Reconciliation	Areas where US domestic law and international standards share common principles but differ in scope, stringency, or enforcement. The gap is real

	but not absolute — domestic compliance with the stronger international standard is possible within existing US legal structures.
Irreconcilable Difference	Areas where US domestic law and international standards are structurally and fundamentally incompatible. Compliance with the international standard would require either congressional legislation overturning established doctrine or judicial overruling of deeply embedded precedent. Neither is currently likely.

## T3-II. AREAS OF GENUINE CONVERGENCE

There are genuine areas where US domestic law and international standards align — where the domestic framework, properly applied, meets or approaches the international benchmark:

Area of Convergence	Analysis
ICWA's Child Welfare Protections	ICWA's core requirements — tribal notification, heightened evidentiary standards, placement preferences, active efforts — align closely with international standards for protecting indigenous children. UNDRIP Article 22 and the CRC both require that removal of indigenous children be a last resort and that cultural continuity be maintained. A court that fully and faithfully implements ICWA satisfies both domestic law and the relevant international standard. The convergence is real; the enforcement gap is the problem, not the standard itself.
Recognition of Tribal Sovereignty	US doctrine formally recognises tribal nations as sovereign governments with inherent authority. This aligns with UNDRIP's recognition of self-governance rights. The doctrinal convergence is genuine even if the practical application — through the Plenary Power Doctrine, Montana, and Oliphant — significantly narrows what sovereignty means in practice.
Treaty Enforcement	US courts do enforce treaty rights in many contexts. The Boldt Decision ( <i>United States v. Washington</i> , 1974) enforcing tribal fishing rights under the 1855 Stevens Treaties is the most celebrated example. International law's requirement that treaty obligations be honoured is satisfied where domestic courts do so.
Trust Responsibility Principle	The Seminole Nation Standard — the most exacting fiduciary standards — is not significantly different from what international law requires of states administering trust-like relationships with indigenous peoples. If the US applied the Seminole Nation Standard consistently and rigorously, domestic and international obligations would substantially converge.
VAWA Tribal Jurisdiction	The VAWA 2013/2022 restoration of tribal criminal jurisdiction over non-Native offenders moves US domestic law toward the international standard requiring effective protection of indigenous women from violence. The direction of travel is convergent, even if

the current domestic position still falls short of full international compliance.

### T3-III. AREAS OF PARTIAL RECONCILIATION

These are areas where the gap between Track 1 and Track 2 is real and significant, but not structurally irreducible. Compliance with the international standard is achievable within the existing domestic legal framework — it requires political will, better enforcement, and in some cases statutory amendment, but not the overruling of foundational constitutional doctrine.

Area	Gap and Path to Reconciliation
ICWA Enforcement	The gap: domestic law is formally adequate; enforcement is systematically deficient. International standard requires effective — not merely nominal — protection. Path to reconciliation: stronger federal oversight of state court ICWA compliance, federal private right of action for ICWA violations, mandatory judicial training, and BIA enforcement authority. None of these require constitutional amendment.
FPIC in Consultation Processes	The gap: US treats FPIC as aspirational; international law treats it as a substantive right. Path to partial reconciliation: US consultation requirements — which do exist across multiple statutory frameworks — can be strengthened to approximate meaningful consent without adopting a full veto right. Executive action and statutory amendments could close much of the gap without requiring constitutional revision.
Violence Against Indigenous Women	The gap: VAWA 2013/2022 partially addressed the Oliphant gap but residual jurisdictional limitations and resource deficits create impunity that international law condemns. Path to reconciliation: full extension of tribal jurisdiction to all crimes committed against tribal members in Indian country, adequate federal funding of tribal law enforcement and prosecution, and interstate recognition of tribal orders of protection. Legislatively achievable.
Remedies for Living Survivors of Historical Policies	The gap: US courts bar most claims for historical wrongs on limitation and immunity grounds. International law requires effective remedies and non-repetition measures. Path to partial reconciliation: Congress could enact claims-settlement legislation, truth and reconciliation processes, and reparations frameworks — as proposed in multiple bills — without requiring judicial doctrine revision. The Cobell settlement demonstrated that massive trust-responsibility remediation is achievable.
Tribal Court Recognition	The gap: US courts extend comity to tribal court judgments inconsistently; federal courts sometimes de novo review tribal jurisdiction determinations rather than deferring. International law requires genuine recognition of indigenous justice systems. Path to reconciliation: ICWA's mandatory deference to tribal court jurisdiction decisions provides a model that could be extended. Congressional

clarification of the full-faith-and-credit obligations for tribal court orders would substantially close this gap.

## T3-IV. IRRECONCILABLE DIFFERENCES

The following are areas where US domestic law and international human rights standards are genuinely, structurally, and currently irreconcilable. These are not gaps that can be closed by enforcement, executive action, or incremental legislation. They reflect foundational differences in how the two systems understand the relationship between the state and indigenous peoples.

### What 'Irreconcilable' Means Here

An irreconcilable difference is one where compliance with the international standard would require either: (a) the Supreme Court to overrule foundational and entrenched precedent; (b) Congress to fundamentally restructure the constitutional relationship between the federal government and tribal nations; or (c) the United States to ratify binding international instruments (ILO C169) that its domestic legal and political framework has consistently rejected. These are not merely enforcement failures — they are doctrinal incompatibilities.

Irreconcilable Difference	US Position	International Standard	Why Irreconcilable
The Plenary Power Doctrine	Congress has near-absolute, largely unreviewable authority to abrogate treaty rights and alter the status of tribal nations (Lone Wolf v. Hitchcock, 1903; long-standing doctrine).	The right to self-determination (ICCPR Article 1; UNDRIP Article 3) requires that indigenous peoples not be subject to unilateral legislative override of their political status and rights. Consultation and consent — not unilateral power — are the international standard.	Overruling the Plenary Power Doctrine would require the Supreme Court to reverse over 120 years of precedent and reconstruct the foundational architecture of federal Indian law. Congress would have to accept substantive limits on its authority over Indian affairs. Neither is politically or judicially likely.
Compensation for Aboriginal Title Takings	Tee-Hit-Ton Indians v. United States (1955): the United States may extinguish aboriginal title	CERD, ICCPR, and UNDRIP Articles 26-28 require that indigenous peoples receive restitution	Tee-Hit-Ton has never been overruled. Overruling it

	(unrecognised title) without paying just compensation under the Fifth Amendment.	or just and fair compensation when their lands are taken. The mere fact that title was never formally recognised by the colonising power does not under international law justify non-compensation.	would expose the United States to potentially massive liability for historical land takings and would require a fundamental revision of the legal treatment of aboriginal title. No current judicial or political trajectory suggests this will occur.
External Self-Determination	US policy and courts treat self-determination as purely internal — autonomy within the existing state structure. Independence or sovereign equality with other nations is not recognised as an option for tribal nations.	International law strongly protects internal self-determination for indigenous peoples. Whether systematic denial of internal self-determination within established states generates a claim to external self-determination or remedial secession for indigenous peoples is a genuinely contested area of international law — argued in advocacy and scholarship but not settled doctrine.	The US will not recognise any right of tribal nations to secede or achieve sovereign equality with foreign nations. International law scholars disagree on whether remedial secession applies to indigenous peoples generally. This area should be classified as a major structural conflict rather than a settled irreconcilable difference, because the international-law position itself is contested.

<p>FPIC as a Veto Right</p>	<p>US treats FPIC as aspirational. Consultation — not consent — is required before governmental actions affecting indigenous peoples. Congressional enactments are not subject to indigenous veto.</p>	<p>FPIC is a strong international standard, particularly in matters affecting indigenous lands, resources, relocation, and cultural survival. ILO Convention 169 and many international bodies and commentators treat it as requiring a process aimed at genuine consent and, in some contexts, as carrying powerful blocking effect. The extent to which FPIC functions as a universal veto right across all contexts remains debated.</p>	<p>The US has not ratified ILO C169 and treats FPIC as aspirational. Implementing any robust consent requirement would conflict with the Plenary Power Doctrine and established regulatory frameworks. This is a deep structural conflict; partial reconciliation in specific sectors may be achievable through legislation but a general veto-equivalent standard is not currently attainable under US doctrine.</p>
<p>Blood Quantum as Tribal Membership Criterion</p>	<p>Federal statutes use blood quantum as an eligibility criterion for certain federal benefits. Courts treat this as political, not racial classification (Morton v. Mancari, 1974; Brackeen, 2023).</p>	<p>International concern is strongest where biological criteria are externally imposed by the state or operate in exclusionary ways. UNDRIP Article 33 recognises indigenous peoples' right to determine their own membership. Tribally chosen membership criteria stand on a different normative footing from state-imposed biological requirements.</p>	<p>The sharpest international concern is with externally imposed biological criteria and federal eligibility schemes. Where tribes themselves apply blood-quantum criteria as a matter of their own sovereign membership law, the normative tension is different. This is better classified</p>

			as partial reconciliation with substantial normative tension rather than outright irreconcilable.
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### T3-V. THE MASTER COMPARISON TABLE

The following table provides a structured side-by-side comparison of Track 1 and Track 2 positions across all major topics. Gap labels: IRRECONCILABLE = structural and doctrinal incompatibility that would require overruling foundational precedent or constitutional amendment to resolve; Deep structural conflict = major incompatibility where partial reconciliation in specific sectors may theoretically be achievable but a general resolution requires fundamental legislative or doctrinal change not currently likely; Major structural conflict = serious incompatibility where the international-law position itself is contested, making the gap real but difficult to characterise with certainty; Partial reconciliation = real gap but closable through legislation, enforcement, or executive action within the existing constitutional framework; Convergence = domestic law, properly applied, meets or approaches the international standard.

Issue	Track 1 — US Courts	Track 2 — International Law	Gap Assessment
Congressional authority over indigenous rights	Plenary power: near-absolute, largely unreviewable	Self-determination: states cannot unilaterally override indigenous rights	<b>IRRECONCILABLE</b>
Treaty obligations	Enforceable but abrogable by Congress; courts apply deference to agency interpretation	Pacta sunt servanda: binding obligations; cannot be unilaterally abrogated	<b>IRRECONCILABLE</b>
Compensation for land takings	No compensation for unrecognised aboriginal title (Tee-Hit-Ton)	Full compensation or restitution required (CERD, ICCPR, UNDRIP 26-28)	<b>IRRECONCILABLE</b>
FPIC	Aspirational; consultation is operative standard	Strong international standard; many bodies treat as requiring genuine consent; extent of veto-like effect debated	<b>Deep structural conflict</b>
External self-determination	Not recognised; internal autonomy only	Internal self-determination strongly protected; external self-determination / remedial secession contested even within international law	<b>Major structural conflict</b>

Blood quantum	Political (not racial) classification; constitutionally permissible	International concern sharpest where state-imposed; tribal self-definition stands on different normative footing	<b>Partial reconciliation with normative tension</b>
ICWA child welfare protections	Mandated but systematically under-enforced	Aligned in principle; gaps in US enforcement fall below international standard	<b>Partial reconciliation</b>
Tribal sovereignty recognition	Formally recognised but narrowed by Plenary Power, Montana, Oliphant	Must be substantive and genuine under UNDRIP Arts. 3-5, 18-20	<b>Partial reconciliation</b>
Protection from violence for indigenous women	VAWA 2013/2022 partially addresses gaps; residual impunity remains	Effective protection required; jurisdictional gaps identified as violations	<b>Partial reconciliation</b>
Consultation before actions affecting tribes	Required in various forms by statute and Trust Responsibility	Must be meaningful and in good faith toward FPIC outcome (UNDRIP Art. 19)	<b>Partial reconciliation</b>
Tribal court recognition	Comity extended inconsistently; federal review sometimes de novo	Indigenous justice systems should receive meaningful recognition and respect consistent with Indigenous self-government and fair-process guarantees (UNDRIP Art. 40)	<b>Partial reconciliation</b>
Remedies for historical wrongs	Largely barred (immunity, limitations, political question)	Effective remedies including restitution and non-repetition required	<b>Partial reconciliation</b>
Trust Responsibility principle	Seminole Nation Standard proclaimed; enforceable only where specific statutory/regulatory/trust-asset predicate exists (Mitchell I, II; Jicarilla); narrowed by immunity and discretion	International law supports heightened duties of protection, good faith, non-discrimination, participation, and effective remedy in state dealings affecting indigenous peoples	<b>Partial reconciliation</b>
Treaty text interpretation	In favorem indigenarum canons exist and are sometimes applied	International law requires same approach; generally converges	<b>Convergence</b>
Prohibition on genocide and forced assimilation	Genocide Convention ratified; forced assimilation prohibited in current policy	Customary international law; jus cogens prohibition	<b>Convergence</b>
Expert witness standard for	ICWA requires qualified expert familiar with tribal culture	Aligns with international right to culturally appropriate proceedings	<b>Convergence</b>

indigenous proceedings			<b>Convergence (incomplete)</b>
VAWA tribal jurisdiction direction of travel	Expanding toward broader protection with VAWA 2013/2022	Requires effective protection; US moving toward compliance	

## T3-VI. IMPLICATIONS FOR THE SALAZAR INVESTIGATION

The three-track analysis produces a specific framework for assessing what happened to Crystal Salazar across four dimensions:

### A. Violations of US Domestic Law Alone

If Crystal Salazar's relevant tribal connection can be established and any child welfare, placement, or custody proceedings affected her, then US courts and agencies were bound by ICWA's mandatory requirements. Any failure to make the required inquiry, provide tribal notification, apply the correct evidentiary standards, or follow placement preferences constitutes a violation of US federal law regardless of international standards. Depending on the claim, forum, and procedural posture, such violations may support invalidation under 25 U.S.C. § 1914, reversal or vacatur on direct review, remand for compliance, or other statutory or procedural relief under US law.

### B. Violations of International Law That US Courts Would Acknowledge

Where the international standard aligns with US domestic law (the convergence category), violations of US law are simultaneously violations of international law. A failure to apply ICWA, for example, is both a domestic statutory violation and a violation of the international standard for protection of indigenous children. While US courts would frame the remedy in domestic law terms, the IAJ is entitled to characterise the violation in international human rights terms as well.

### C. Violations of International Law That US Courts Would Not Address

In the irreconcilable categories — the Plenary Power Doctrine, lack of FPIC, non-compensation for aboriginal title — the IAJ may find violations of international standards that have no effective remedy in US courts. This does not mean the violations are less real; it means they require international rather than domestic remediation mechanisms: UN treaty body communications, IACHR petitions, diplomatic engagement, and the political and reputational force of international human rights accountability.

### D. The Evidential Priority

Across all three tracks, the threshold question is the same: has Crystal Salazar's relevant tribal connection been established — tribal citizenship, eligibility for citizenship or membership, Indian-child status under ICWA, or treaty-linked tribal identity? Without that foundation, neither domestic ICWA protections nor international indigenous rights protections are triggered in their

most specific forms. The primary evidence for establishing that connection should be genealogical documentation, family records, archival materials, tribal records, and direct communication with the relevant tribe or tribes. Each tribe determines its own membership criteria, making tribal confirmation central. DNA evidence, if used at all, should be treated as supplementary and only where consistent with the relevant tribe's own standards — it is not a primary route to establishing tribal status in US law or for ICWA purposes.

### Concluding Assessment

The three-track analysis reveals a fundamental asymmetry at the heart of indigenous rights in the United States. US domestic law contains genuine protections — ICWA, the Trust Responsibility, tribal sovereignty, VAWA — that represent a more robust domestic framework than most states have enacted. Yet those protections are systematically under-enforced in ways that international bodies have identified as treaty violations. And in the foundational areas — plenary power, FPIC, land rights, self-determination — US doctrine and international law are structurally incompatible in ways that cannot be resolved by domestic courts alone. For Crystal Salazar, this means that the full account of any rights violations she may have suffered requires both domestic and international legal analysis — and that the IAJ, as an international body, is uniquely positioned to apply the complete framework that US courts, confined to domestic doctrine, cannot.

## QUICK REFERENCE: KEY AUTHORITIES ACROSS ALL THREE TRACKS

Authority	Track	Key Principle
Lone Wolf v. Hitchcock (1903)	Track 1	Plenary power: Congress may abrogate treaty rights — near-unreviewable
Seminole Nation v. US (1942)	Track 1 + 2	Most exacting fiduciary standards — converges with international law
Tee-Hit-Ton Indians v. US (1955)	Track 1	No compensation for aboriginal title takings — irreconcilable with CERD/ICCPR
Oliphant v. Suquamish (1978)	Track 1	No tribal criminal jurisdiction over non-Natives — partially remedied by VAWA
Montana v. United States (1981)	Track 1	Restrictive test for tribal civil jurisdiction over non-members on fee lands — expansively applied
McGirt v. Oklahoma (2020)	Track 1 + 2	Creek reservation never disestablished; reservation boundaries governed by federal law, not state practice — key modern sovereignty anchor
U.S. v. Jicarilla Apache Nation (2011)	Track 1	Trust relationship is specific and statutory — not a general common-law fiduciary relationship; enforceable duties require specific predicate
Brackeen v. Haaland (2023)	Track 1	ICWA upheld; Indian child classification is political, not racial

ICWA (1978)	Track 1 + 2	Mandatory protections for indigenous children — converges with international standard
VAWA Amendments (2013/2022)	Track 1 + 2	Tribal jurisdiction over non-Natives partially restored — partial reconciliation
UNDRIP (2007, US endorsed 2010)	Track 2	Comprehensive international indigenous rights — 'moral and political force' in US
ILO Convention 169 (1989)	Track 2	Primary binding international treaty on indigenous rights — not ratified by US
ICCPR Art. 1 + 27	Track 2	US is a state party: international obligations under Art. 1 (self-determination) and Art. 27 (minority cultural rights); domestic judicial enforceability is more limited and must be distinguished from international obligations
CERD (1965)	Track 2	Elimination of racial discrimination; Committee has found repeated US violations
CEDAW GR 39 (2022)	Track 2	Rights of indigenous women and girls; structural discrimination as treaty violation
Inter-American System	Track 2	IACHR/IACtHR: effective protection obligations; Oliphant gap identified as violation
Plenary Power Doctrine	Gap — Irreconcilable	US: near-absolute congressional authority; International: self-determination limits state override
FPIC	Gap — Deep structural conflict	US: consultation is operative standard; International: strong standard aiming at genuine consent; veto-like effect in some contexts debated
Aboriginal Title Compensation	Gap — Irreconcilable	US: no compensation required (Tee-Hit-Ton); International: full compensation or restitution required (CERD, ICCPR, UNDRIP 26-28)
ICWA Enforcement	Gap — Partial	Standard converges; US enforcement gap falls below international effective-protection requirement
Tribal Sovereignty Scope	Gap — Partial	Doctrine converges; Montana/Oliphant erosion creates substantive gap with UNDRIP scope

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This three-track guide was developed for Professor Craig Paterson at the Helena Kennedy Centre for International Justice, Sheffield Hallam University. It is an expanded version of the Quick Reference Guide to Indigenous Rights in the USA and should be read alongside the companion expert witness documentation series (Documents 1–3B, v6). Nothing in this document constitutes legal advice. Any litigation or formal proceedings require counsel qualified in federal Indian law and international human rights law.

Quick Reference Guide to Indigenous Rights in the United States of America: A Three-Track Analysis. Prepared for Professor Craig Paterson: Study of Crystal Salazar

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