INDIGENOUS PEOPLES' RIGHT TO SELF-DETERMINATION AND OTHER RIGHTS RELATED TO ACCESS TO JUSTICE: THE NORMATIVE FRAMEWORK

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Definitions of Access to Justice:

> "The right of individuals and groups to obtain a quick, effective and fair response to protect their rights, prevent or solve disputes and control the abuse of power, through a transparent and efficient process, in which mechanisms are available, affordable and accountable"[1] OR
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> "Opening up the formal systems and structures of the law to disadvantaged groups in society. This includes removing legal and financial barriers, but also social barriers such as language, lack of knowledge of legal rights and intimidation by the law and legal institutions."[2]

When speaking of Indigenous Peoples and access to justice, it is important to understand the historical contextual framework for the litany of injustices perpetrated against Indigenous Peoples in order to determine if we can in fact ever "reconcile" the dramatically different worldviews of Indigenous Peoples and others, and in particular nation-States. In my view, the cultural clashes experienced by most, if not all, Indigenous Peoples across the globe have crystallized or hardened to the point that full reconciliation may not ever be possible. We are all acutely aware of this history, which has been forcefully, persuasively analysed from a legal perspective by Indigenous scholars such as Robert Williams in his volume *The*

1 Justice Charles Kajimanga, Enhancing Access to Justice Through Alternative Dispute Resolution Mechanisms – The Zambian Experience, presented at the Annual Regional Conference Held at Southern Sun, Mayfair Nairobi Kenya. (Nairobi: Annual Regional Conference on Enhancing Access to Justice, 2013) p. 2).
2 Global Alliance Against Traffic in Women. 1st Group Session on Rule of Law, Justice and Security Talking Points (New York: GAATW, 2013) p. 4.

American Indian in Western Legal Thought[3] and his more recent volume entitled *Savage Anxieties*.[4]

For now, one or two examples are worth recalling in order to illustrate my point. Indigenous Peoples are no strangers to the age old ploy of denying status in order to deny rights. This was a matter of concern to Bartolome de las Casas and others in the early debates triggered by the so-called "discovery" of lands already inhabited by Indigenous Peoples. Such a ploy is effectively illustrated in the *Edwards* v *Canada* case (or referred to as the Persons case) in 1930 wherein women were being denied the status as "persons" in order to be denied eligibility to be appointed to the Senate.[5] Indigenous Peoples experienced the same ploy in relation to the right to self-determination throughout the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) negotiations with the attempt by States to deny us status as peoples in order to deny this primordial right.

Specifically related to the topic of access to justice, in 1927 the Indian Act (originally adopted in 1876 in Canada) was explicitly amended to make it illegal for First Nations to raise money or retain a lawyer to advance land claims, thereby blocking effective political or court action. This is but one example of the overt and nefarious means to block "access to justice" instituted by a government specifically against Indigenous Peoples. Blatant discrimination is at the heart of such actions and ultimately it is the truth about such discriminatory acts that must be told, especially to the younger generations in order for us to effect change in the long run.

I have been asked to provide an overview of the normative framework needed to begin to right the wrongs concerning access to justice, including truth and reconciliation. The normative framework necessary has been established by the Declaration—the most comprehensive international human rights instrument specifically concerning Indigenous Peoples. And, in this regard, the Declaration articles must be read as a

3 Robert Williams, The American Indian in Western Legal Thought: the Discourses of Conquest, (New York: Oxford University Press, 1991).
4 Robert Williams, Savage Anxieties: The Invention of Western Civilization, (New York: Palgrave Macmillan, 2012).
5 Edwards v. Canada (Attorney General), [1930] A.C 124, 1929 UKPC, Appeal No. 121.

whole and in context. Like all other human rights, these minimum standards are inter-related, inter-dependent, indivisible, and inter-connected.

I would like to emphasize the right of self-determination and a number of articles relevant to the collective rights of Indigenous Peoples, then conclude with a few comments on developments in Alaska, as a hopeful example of improving access to justice through Indigenous self-determination and "partnership" or cooperation with others.

The right to self-determination

For Indigenous Peoples, the starting point for access to justice at every level is directly related to, dependent upon, and connected to the right to self-determination. Internally, Indigenous Nations, communities, and Peoples have relied upon their respective values, customs, practices, and institutions to ensure justice for their members. Like social contract theory, survival of Indigenous Nations, Peoples and communities required "an implicit agreement among the members of a society to cooperate."[6] There were not only basic rules and protocol within Indigenous societies but also responsibilities, freedoms, status, and "rights" afforded to each member, sometimes in the form of tasks, privileges, and office. And, this collective expression and the dynamics of internal self-determination offered many forms of tangible and intangible security of person and cultural identity.[7] Individual security, identity, dignity, and self-worth are intimately tied to the collective dimension of an Indigenous Peoples' right to self-determination. When Indigenous Peoples' right to self-determination is denied, the repercussions are felt by its individual members and overall Indigenous communities are destroyed or become vulnerable to destruction.[8]

6 Oxford Dictionary, definition for "Social Contract" (New York: Oxford University Press, 2012).

7 Dalee Sambo, "Sustainable Security: An Inuit Perspective," in J. Kakonen, ed., Politics and Sustainable Growth in the Arctic, (Hants, England: Dartmouth Publishing Company, 1993), pp. 51–62.

8 Davis Inlet: Innu Community in Crisis, 1992 at http://www.cbc.ca/archives/categories/society/poverty/davis-inlet-innu-community-in-crisis/a-heart-wrenching-cry-for-help.html documentary wherein two medical doctors stationed at the small, inadequate health clinic made the linkage between denial of right to self-determination and "huffing,", alcohol abuse, and shocking suicide statistics

It is by no means an academic phenomenon or exercise that has compelled international legal scholars and publicists to affirm that the right of self-determination is regarded as a pre-requisite to the exercise and enjoyment of all other human rights. For Indigenous Peoples around the world, it has taken on various forms. Indeed, when nation-State members of the United Nations (the UN) were searching for "certainty" in relation to self-determination, in 1994, then Chairperson for Aboriginal and Torres Strait Islander Commission stated:

> "Self-determination for the member states of the UN has taken many forms. The same will happen, I believe, in the evolution of self-determination for indigenous peoples. There is not a single future to which we must conform, there are multiple futures. And multiple futures within the same environment…."[9]

Therefore, the ongoing or future exercise of this collective right must be defined by the "self" in self-determination. And, the intellectual and political space needed to define the contours of the exercise of this right must be afforded and guaranteed to the Indigenous Peoples concerned. And, how each tribe, nation or Peoples choose to represent themselves and their interests outside of their communities, including at the international level, and with all others external to their communities, should not be stifled in any way, shape or form. The false dichotomy of internal and external self-determination cannot and should not be tolerated. This includes the efforts of Indigenous Peoples to gain access to justice collectively when collective rights have been violated or denied. Processes, mechanisms, and means will undoubtedly have to be flexible enough or specifically adjusted to accommodate Indigenous political developments and political enterprises where they have not yet taken place and further enhancements will have to be made where they have already occurred. For example, in those regions and territories where Indigenous Peoples are not even recognized on the basis of their status as Indigenous Peoples, ways and means for respecting and recognizing their distinct

amongst the Innu of Davis Inlet.

9 United Nations Working Group on Indigenous Populations, Statement by the Aboriginal and Torres Strait Islander Commission, UNWGIP, 12th Sess., (1994).

legal and political status and human rights must be identified. In other regions, such as Nunavut in the Canadian Arctic, where the Inuit have been recognized and their rights to self-government as well as lands, territories, and resources have been affirmed, surprisingly because of government led abrogation of constitutionally protected rights, there remains a need for adjustment to ensure genuine access to justice in relation to the full realization of the Inuit right to self-determination.

Genocide and access to justice

Directly related to the realized or potential for destruction of Indigenous communities and the collective dimension of their rights is the matter of genocide and cultural genocide. The 1948 Genocide Convention is significant due to its explicit reference to the right of *groups* to physical existence.[10] As is known, the definition or origin of genocide can be traced to Raphael Lemkin, a jurist recognized as coining the term.[11] Lemkin defined genocide as "the criminal intent to destroy or to cripple permanently a human group. The acts are directed against groups, as such, and individuals are selected for destruction only because they belong to these groups."

Moral outrage expressed by individuals and governments is critical to the identification, punishment and more importantly, the prevention of such acts. However, when genocide occurs against Indigenous Peoples, many States behave as though it never happened. And, no fair inquiry is allowed. This distorts any rights discourse, leaving Indigenous individuals and/or communities without any opportunity to try or charge governments as perpetrators of the crime of genocide. There is no opportunity to even pose the question of who committed such a crime let alone discuss damages or other measures of recourse.

Indigenous Peoples must take the view that no comparison should take place and that each case of genocide should be understood within their own historical, political, cultural and social context. Without pressing such claims and identifying the historical facts, as well as

10 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, GA Resolution 260 (3).

11 G. J Andreopoulos, Genocide: Conceptual and Historical Dimensions, (Philadelphia: University of Pennsylvania Press, 1994) p. 1.

assessing the blame and responsibility, no solutions will ever be found. Presently, States have the upper hand by controlling the definition of genocide and the interpretation of the provisions of the Genocide Convention. Such cushioning by the UN and the international community only results in measures to further safeguard States: genocide did not take place, there is no entitlement, no legal recourse, no responsibility and therefore, no human rights responsibilities. This is an example of an area where serious, substantive adjustments need to be made.

During the 2002 session of the UN Commission on Human Rights Working Group on the Draft Declaration on the Rights of Indigenous Peoples, article 7 concerning "cultural genocide" or "ethnocide" was under consideration and few Indigenous representatives were prepared to deal with State efforts to eliminate any reference to these important provisions and to significantly alter its elements. Despite the final outcome, articles 7 and 8 of the Declaration concerning security, genocide, and essentially cultural genocide remain of particular importance to Indigenous Peoples in the context of access to justice, including truth and reconciliation. The specific provision that "States shall provide effective mechanisms for prevention of, and redress for" a range of actions damaging to the cultural integrity of Indigenous Peoples must be underscored.

Another area that has caused extraordinary destruction of Indigenous communities by virtue of denying the collective dimension of their rights are the matters related to lands, territories, and resources, which ultimately has the probability of leading to cultural genocide. In this way, the basic survival of Indigenous Peoples becomes a matter of access to justice. Though many are of the view that such actions are history and that the long list of atrocious, genocidal acts no longer occur, the truth is they are ongoing and I firmly believe, they are intensifying through aggressive extractive industry,[12] hydroelectric projects,[13] land dispossession in the name of world heritage sites,

12 Proposed uranium mining in Greenland.

13 Lucy Jordan, Belo Monte Dam, The Rio Times, 7 May 2013, http://riotimesonline.com/brazil-news/front-page/brazil-indians-occupy-belo-monte-dam-site/#.

national and trans-frontier parks, and conservation areas[14] and adverse impacts of climate change, to name but a few.

Increasingly, Indigenous Peoples across the globe are under extraordinary pressure from all quarters. Often, there is not even baseline recognition of Indigenous land and territorial rights, thereby paving the way for Indigenous communities to be bulldozed by State and industry development schemes. In other instances, minimum recognition is afforded but trampled. Further, where Indigenous land and territorial rights have been affirmed, the systems of justice are systematically stacked against Indigenous Peoples. In the face of such forces, how will Indigenous communities gain any access to justice in order to safeguard against cultural destruction and cultural genocide?

In this regard, article 10 enunciates a prohibition against forcibly removing Indigenous Peoples from their lands or territories and that no relocation shall take place without their free, prior and informed consent and after agreement on just and fair compensation, and where possible, an option of return. The wording of article 10 essentially creates a pathway to justice or access to justice. Access is the procedural dimension, and justice is to receive fair and just remedy for the violation of rights. The lands, territories, and resource provisions reflected in articles 25, 26, 27, 28, and 29 are also important to underscore for Indigenous Peoples and their quest for fair, meaningful, and effective hearing of their claims in order to receive fair and just remedy for the violations of these crucial collective human rights.

The days of measures such as the Indian Claims Commission in the United States should effectively be over. The land rights provisions of the Declaration and in particular, articles 27 and 28 place an onus upon States to keep themselves in check with regard to Indigenous land rights as well as to substantively address the legal recognition and protection of Indigenous Peoples' rights to their homelands, including specific measures for access to justice where they have been deprived of such collective rights. Any and all such processes for recognition of land rights or "redress"—or essentially to obtain justice

14 See general discussion about this dynamic on the continent of Africa at: http://www.culturalsurvival.org/publications/cultural-survival-quarterly/south-africa/transfrontier-parks-south-africa.

with regard to the violation of these collective rights—must involve Indigenous Peoples directly, as included in the explicit language of these articles as well as expressed within articles 18 and 19 of the Declaration. Intimately tied to lands, territories and resources are the Declaration provisions related to harvesting rights and in particular, article 20 and the fact that Indigenous Peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Additional provisions of the Declaration also give rise to redress, reparations, or access to justice in very specific contexts. For example, articles 11 and 12 concerns restitution of cultural property and repatriation of human remains respectively. Other examples include the right to redress in relation to development activities and to mitigate adverse environmental impacts as referenced in article 32 of the Declaration. Furthermore, the right to observance, recognition, and enforcement of Treaties, agreements and other constructive arrangements is another crucial pathway needed for Indigenous Peoples to effectively access justice in a collective fashion. Article 40 of the Declaration is unequivocal in its statement that the Declaration is the normative framework for access to justice for Indigenous Peoples:

> "Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, *as well as to effective remedies for all infringements of their individual and collective rights*. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights." (emphasis added)

Finally, the right of Indigenous Peoples to financial and technical support from States (article 39) must be recognized and respected in order for genuine access to justice, including truth and reconciliation, in favor of the most disadvantaged peoples across the globe. Again, the procedural and substantive aspect of access to justice must be applied in relation to the rights enunciated within the Declaration and violated.

In regard to reparations, redress, and remedies, it is important to highlight the recently concluded International Law Association

Expert Commentary on the Declaration[15] as it makes a number of comprehensive and crucial linkages that assist in understanding the concept of access to justice and what Indigenous Peoples would regard as the content of justice. For example, the Committee made the distinction between Western notions of redress and reparations attaching to individuals in contrast to the collective dimension of Indigenous Peoples' human rights. The Committee also highlighted the fact that "compensation" should not be merely regarded as monetary—remedies, within the Indigenous context (and affirmed by the Declaration), should include material as well as non-material elements. The report states "*non-material reparations* have a special significance, on account of the fact that, in many instances, human rights breaches lead not only their members to feel physical and psychological pain at the individual level, but also to destroy the spiritual identity and even the socio-political construction of the collectivity—producing harmful consequences that usually perpetuate at the intergenerational level—since the inherent order of the universe surrounding them is affected."[16]

More significantly, the ILA Committee reports confirm that, among other Indigenous human rights, reparations, redress, and remedies are in fact "crystallized in the realm of customary international law." The ILA Committee is right to recognize that the whole of the Declaration cannot be considered as falling within the scope of general principles of international law. However, it is highly significant that the Declaration provisions that seek to provide a pathway to justice by making explicit reference to redress fall under what is regarded as "corresponding to established principles of general international law, therefore implying the existence of equivalent and parallel international obligations to which States are *bound* to comply with."[17]

15 See International Law Association, Committee on the Rights of Indigenous Peoples Report, The Hague Conference (2010 pp. 39–43, http://www.ila-hq.org/en/committees/index.cfm/cid/1024

16 International Law Association, Committee on Rights of Indigenous Peoples Report, Hague Conference (2010) p. 40.

17 See International Law Association, Committee on Rights of Indigenous Peoples Report, Sofia Conference (2012) pp. 43–52, http://www.ila-hq.org/en/committees/index.cfm/cid/1024

Status of Indigenous Peoples

Now that I have turned the Declaration into the Indigenous Peoples' Access to Justice Declaration, I want to briefly comment on the legal personality of Indigenous Peoples. I hesitate to do so because it would not be prudent to open the door to this question for those that are unfriendly toward us and our desires, aspirations, and more importantly, our fundamental human rights. However, I want to make only two points.

First of all, the Declaration has affirmed that we are "peoples" despite the efforts of some States to deny this fact and those who went even further in their attempts to deny the equal application of the right of self-determination to us or more accurately to those States who tried to place a wedge between us and all other peoples through racially discriminatory and intellectually dishonest means.[18]

18 The following examples demonstrate how Canada and the U.S. misleadingly sought to deny Indigenous Peoples the right to self-determination at the ILO – and therefore also undermine access to justice as "peoples". See International Labour Office, Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), Report IV (2A), ILO, 76th Sess., (1989) ,position of government of Canada:

> "… self-determination under international law can imply the *absolute* right to determine political, economic and social [and] cultural programmes and structures without *any involvement whatsoever* from States. Consequently, any use of the term "peoples" would be unacceptable without a qualifying clause which would indicate clearly that the right of self-determination is not implied or conferred by its use." [emphasis in original]

And the position of the government of the United States:

> "Adoption of the term "peoples" could be used to argue for an interpretation of international law to include an *absolute* right of indigenous groups not only to self-determination in the political sense of separation from the State but also to absolute independence in determining economic, social and cultural programmes and structures, which would also be unacceptable to many States.
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> "ILO Convention 169, article 1(3), which provides: "The use of the term *peoples* in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law." Though this provision alone does not affirm that Indigenous Peoples are "peoples" in international law, the use of the term in the context of a Convention correctly acknowledges the status and rights of Indigenous peoples as "peoples."

Further, see International Labour Organization, *Report of the Committee on Convention No. 107*, International Labour Conference, Provisional Record, 76th Session, Geneva, 1989, No. 25, para. 42:

To be clear, preambular paragraph 2 and article 2 of the Declaration expressly affirm that Indigenous Peoples are free and equal to all other peoples. Furthermore, ILO Convention 169 expressly uses the term Indigenous "peoples." The UN has now resolved the issue that Indigenous Peoples are "peoples." Therefore, ILO Convention 169 must now be read together with the UN Declaration, as confirmed by the ILO and others. Through these specific provisions (and all other provisions of the Declaration), the group or collective human rights of Indigenous Peoples are affirmed and as such, our legal personality as peoples is affirmed. We are rights' holders as groups and we are also holders of responsibilities (or duties) as such. The sources of our legal personality, possessing rights and duties (or responsibilities) and increasingly, our capacity to bring claims concerning such rights have been recognized by the UN human rights regime and regional inter-governmental human rights regimes such as the OAS and African Union. In addition, nation-States have recognized the legal personality of Indigenous Peoples as peoples through their constitutions, national legislation, agreements, Treaties, policy, and other instruments.

Recognizing the important linkage between "peoples" and the right to self-determination within international human rights law, increasingly scholars and State government representatives have moved away from a purely State-centered conception of the term "peoples." In this regard, Indigenous Peoples have affirmed and repeatedly asserted that we are the "self" or the subjects, as peoples,

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The Chairman considered that the text was distancing itself to a certain extent from a subject which was *outside the competence of the ILO*. In his opinion*, no position for or against self-determination* was or could be expressed in the Convention, *nor could any restrictions be expressed in the context of international law*. [emphasis added]

See further, UN-Indigenous Peoples' Partnership (UNIPP), "For democratic governance, human rights and equality", Multi-Donor Trust Fund, Terms of Reference ILO, OHCHR, UNDP, Framework Document, (Geneva: UNIPP, 2010) p. 4:

> With the adoption of the UN Declaration, the international normative framework regulating the protection of the rights of indigenous peoples has been firmly strengthened. The ILO Convention No. 169 on the rights of indigenous and tribal peoples, adopted by the ILO in 1989, is fully compatible with the UN Declaration on the Rights of Indigenous Peoples and *the two instruments are mutually reinforcing*. The two instruments provide the solid framework for promoting indigenous peoples' rights and addressing the existing implementation gaps at all levels. [emphasis added]

who are free to determine our political status and pursue our economic, social and cultural development. Clearly, we are diverse and are all at varying stages of capacity and readiness to engage in local, regional, national, and international political and legal enterprises to increase and improve access to justice. Just as the Navajo Nation and others at the UN have argued for recognition of their status as Nations and as Indigenous governments, in the North, I have argued that the Inuit not only have a right to status as direct participants in entities such as the Arctic Council, but moreover, a responsibility in the context of good governance. In this way, our legal personality as peoples, Nations, communities, and tribes should not hinder our actions to reverse the historical injustices and to begin creating and re-defining the ways to achieve real justice, truth and reconciliation.

With the adoption of the Declaration, as the normative framework for the protection and promotion of our fundamental human rights, the international community and even treaty bodies have taken note of these crucial human rights norms. The treaty bodies have begun to interpret their respective instruments against the backdrop of the Declaration, taking into consideration the distinct cultural context of Indigenous Peoples when faced with issues and communications that directly impact us. Let us hope that these interpretations begin to take on an even stronger hold within the various regional treaty bodies as well, including the Inter-American system, the African Union, the European Court, and others. I find this to be an extraordinary, positive development, not to mention the number of mechanisms and UN activities concerning Indigenous Peoples now, in contrast to thirty years ago.

Future Adjustments

My second point is that future adjustment in these various regimes is needed to fully accommodate our distinct cultural context and our human rights. This may take the form of a Convention on the Rights of Indigenous Peoples but I won't hold my breath for that political enterprise to be realized. However, as a legally binding instrument accompanied by a robust treaty body, we would have a new and different pathway or access to justice at the international level. If such

a development is realized in my lifetime, I would predict that such a treaty body would be overwhelmed for decades solely on the basis of the injustices that I've seen in my lifetime. Unfortunately, in my assessment, the few nation-State ratifications of ILO Convention 169 reflects a lack of political will and unfounded fear about the genuine respect for and recognition of Indigenous human rights and real "partnership" with Indigenous Peoples, which the Declaration represents.

In the meantime, adjustments that might be explored are options such as a voluntary "optional protocol" to the Declaration that would allow States and Indigenous Peoples to come to the table to resolve Indigenous demands for justice. We may be able to generate real political will through a number of States that may be willing to challenge other UN members at the forthcoming World Conference on Indigenous Peoples in 2014 to initiate a serious, comprehensive program to genuinely and fully implement the provisions of the Declaration both domestically and internationally.

At the same time, I take the long view, and I do believe that there are important, substantive measures taking hold but only in limited quarters. I don't know how we can replicate them elsewhere, for example, in the Russian Federation. Sustained international pressure, awareness, and dialogue are but a few measures that those of us working at the international level can undertake. However, we must all challenge ourselves on this point. Regarding the extraordinary developments achieved to date, we should not forget the text of the ILO Convention 169 and its potential force within those States, which have ratified the Convention and been founded on the lands and territories of Indigenous Peoples. More must be done to invigorate the ILO recourse mechanism essential to this legally binding instrument not to mention a vital campaign to increase ratifications.

Alaska Natives and access to justice

I want to conclude with a few more words about Alaska that relate to problems with access to justice and also articles 13(2) and 34 of the Declaration. As one might imagine there are huge problems facing Alaska Native people and their access to justice, both procedurally

and substantively. The statistics are in all likelihood the same as those in Australia, New Zealand, Guatemala, Canada, and elsewhere in regard to incarceration rates, etc. In 1979, I worked as a paralegal with the Alaska Judicial Council on a Racial Disparity in Sentencing Study, which confirmed that though we made up only 15% of the total State population, Alaska Native women made up 43% of the prison inmate population and Alaska Native men made up 52%. Despite the list of substantive recommendations made 34 years ago, the system has not changed. However, on February 13, 2013, Alaska Supreme Court Justice, Dana Fabe, offered some hope in her State of the Judiciary report to the State Legislature. Her statement included recommendations concerning the important role of tribal courts throughout rural Alaska, sentencing in villages, circle sentencing, which engages the whole community, and other good reforms.

Justice Fabe invoked the words of Judge Nora Guinn of Bethel, a Yup'ik woman who in 1968 became our State's first Alaska Native judge, took a similar approach to rural justice. She said:

> "Over the years I tried to include people—involve people—in all of my court activities….I started what we call an advisory sentencing court….I'd have them sit and after the people came up and pled guilty….we would send them out and we'd sit and talk about it. And I'd say now what would you advise?…I stress this person is from your village. He's your relative. He's your friend. If you aren't going to help him, nobody else is going to really try to help him because we don't know how to help him."[19]

Further, Justice Fabe stated:

> "Tribal courts bring not only local knowledge, cultural sensitivity, and expertise to the table, but also valuable resources, experience, and a high level of local trust. They exist in at least half the villages of our state and stand ready, willing, and able to take part in local justice delivery. Just as the three branches of state government must work together closely to ensure effective delivery of justice throughout

19 Chief Justice Dana Fabe, The State of the Judiciary: A message by Chief Justice Dana Fabe to the First Session of the Twenty-Eight Alaska Legislature February 13 2013 (2013) p. 9.

> the state court system, state and tribal courts must work together closely to ensure a system of rural justice delivery that responds to the needs of every village in a manner that is timely, effective, and fair."[20]

There are approximately 90 tribal courts in Alaska and a growing number of Tribal court judges, practitioners, and advocates. Curiously, it is through the Tribal courts that we are seeing the most significant expressions of Indigenous self-determination in Alaska, from the Bristol Bay Native Association Tribal Court Enhancement Program to the Sitka Tribe of Alaska to community of Bethel and their Child Welfare Code. Certainly, problems remain and the State of Alaska remains hostile to these developments. However, the desire of Justice Fabe to create real reform offers some hope to the difficult issue of the need for fairness and equality in our access to justice in the North and elsewhere.

Indian Law and Order Commission

> "Every woman you've met today has been raped. All of us. I know they won't believe that in the lower 48, and the State will deny it, but it's true. We all know each other and we live here. We know what's happened. Please tell Congress and President Obama before it's too late."[21]

More recently, the bipartisan Indian Law and Order Commission[22] issued a scathing review and critique of the persistent forms of discriminatory treatment of Alaska Native Tribal governments in

20 *Ibid* at p. 13.

21 Tribal citizen (name withheld), Statement at Indian Law and Order Commission Site Visit to Galena, AK, (18 October 2012).

22 Indian Law and Order Commission is an independent national advisory commission created in July 2010 when the Tribal Law and Order Act P.L. 111-211 (29 July 2010) was passed and extended in 2013 by the Violence Against Women Act Reauthorization, P.L. 113-4 (22 January 2013). President Obama and majority and minority members of Congress appointed the nine Commissioners, all of whom have served as volunteers. See: Indian Law & Order Commission, A Roadmap for Making Native America Safer: Report to the President & Congress of the United States, (Indian Law & Order Commission, 2013).

their efforts to provide access to justice for their respective members. According to the Commission members the "problems in Alaska are so severe and the number of Alaska Native communities affected so large, that continuing to exempt the State from national policy change is wrong…The public safety issues in Alaska—the law and policy at the root of those problems—beg to be addressed…Given that domestic violence and sexual assault may be a more severe public safety problem in Alaska Native communities than in any other Tribal communities in the United States, this provision adds insult to injury. In the view of the Commission, it is unconscionable."[23]

The Commission went on to conclude that "[t]he strongly centralized law enforcement and justice systems of the State of Alaska are of critical concern to the Indian Law and Order Commission. They do not serve local and Native communities adequately, if at all. The Commission believes that devolving authority to Alaska Native communities is essential for addressing local crime. Their governments are best positioned to effectively arrest, prosecute, and punish, and they should have the authority to do so—or to work out voluntary agreements with each other, and with local governments and the State on mutually beneficial terms."[24]

Ultimately, what the Commission has identified is a matter of the full and effective exercise of the right to self-determination by Indigenous Peoples of Alaska through their Tribal governments. To date, the persistent denial of the right to self-determination ensures that "State government authority is privileged over all other possibilities: the State has asserted exclusive criminal jurisdiction over all lands once controlled by Tribes"[25] and has effectively curtailed one of the most visible, dynamic forms of the collective right to self-determination and self-government within Indigenous communities: to safeguard their individual members and their fundamental human rights.

For Indigenous Peoples and governments, there should be no question about the linkage between the exercise of our right to

23 Indian Law and Order Commission, A Roadmap for Making Native America Safer: Chapter 2 Reforming Justice for Alaska Natives: The Time is Now, (2012) p. 55.
24 *Ibid* at p. 55.
25 *Ibid* at p. 45.

self-determination and access to justice. The more we exercise our conception of human rights and the responsibilities of our members combined with our capacity to control both the internal and external affairs of our Nations, communities and Peoples, the better off we are. One of the most visible forms of self-determination of our communities is how we uphold and express our rights and responsibilities. Again, the Declaration speaks of partnership and in order to for us to be full partners, we must enjoy authentic access to justice. States must uphold their obligations, in collaboration with Indigenous Peoples. That "self" in the self-determination of Indigenous Peoples has to be fully realized in all of its forms, from internal self-government to lands, territories, and resources to international affairs. And, self-determination is really the only way to achieve a pathway or access to justice as well as potentially sincere and true reconciliation.