United States Department of State

United States Permanent Mission to the Organization of American States

Washington, D.C. 20520

August 22, 2022

Tania Reneaum Panszi
Executive Secretary
Inter-American Commission on Human Rights
Organization of American States
Washington, D.C. 20006

Re: Onondaga Nation and the Haudenosaunee, P-624-14
Response of the United States

Dear Executive Secretary Reneaum:

The United States Government has the honor of submitting to the Inter-American Commission on Human Rights this response to the petition (the Petition) of the Onondaga Nation and the Haudenosaunee (the Petitioners), P-624-14. The Petition, with exhibits, was received by the Commission on April 14, 2014. In response to the Commission's request for additional information, the Petitioners submitted briefing and exhibits on October 13, 2017. In response to the Commission's inquiry as to the Petitioner's continued interest in this matter, Petitioners submitted an affirmative response on September 21, 2021. Your office transmitted the Petition and the Petitioner's additional documents to us on February 23, 2022. Please find enclosed the United States' response to the Petition. We trust this information is useful to the Commission and thank the Commission for its attention to this matter.

Please accept renewed assurances of my highest consideration.

Sincerely,

Electronically Endorsed/Thomas Hastings

Thomas Hastings
Interim Permanent Representative

Enclosures: As stated.

Enclosures:

1. Onondaga v. New York, No. 10-4273, 500 Fed. Appx. 87 (2nd Cir. Dec. 21, 2012), cert denied, 571 U.S. 969 (2013).
2. City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 202-03 (2005) (rehearing denied, 544 U.S. 1057 (2005)).
3. Cayuga v. Pataki, 413 F.3d 266 (2nd Cir. 2005), cert denied 547 U.S. 1148 (2006).
4. Robins Island Preservation Fund, Inc. v. Southold Corp., 959 F. 2d 409, 424 (2nd Cir. 1999).
5. Dann v. United States, Observations of the United States to the IACHR Report No. 113/01, Dec. 17, 2001.
6. Treaty of Fort Schuyler (1788).

PETITION NO. P-624-14
ONONDAGA NATION AND THE HAUDENOSAUNEE
RESPONSE OF THE UNITED STATES

The Government of the United States appreciates the opportunity to submit these observations on the April 14, 2014, "Onondaga Nation and the Haudenosaunee against the United States of America" petition ("Petition"),[1] as well as the Petitioners' October 13, 2017, Response to the Commission's Request for Additional Information ("2017 Response"), forwarded by the Inter-American Commission on Human Rights ("Commission") via a letter dated February 23, 2022.

The Petition alleges violations of provisions of the American Declaration of the Rights and Duties of Man ("American Declaration" or "Declaration"),[2] the American Convention on Human Rights, and other instruments, including the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"). Specifically, Petitioners allege that "[t]he domestic legal processes available to the Onondaga Nation fail to meet the standard required by the Commission in the Dann case to protect indigenous peoples' rights to property, equality, and judicial protection. For this reason, the Onondaga Nation seeks a declaration that the domestic legal processes afforded to it violate the human rights of the Nation and its citizens."[3]

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[1] Unlike the Onondaga Nation complaint in federal court, which at least stated that the other Haudenosaunee tribes supported the lawsuit, there is no indication in the Petition that the other Haudenosaunee Tribes support Onondaga Nation's petition. As Petitioners know, from Indian Claims Commission (ICC) experience and more recent lawsuits, it is both essential and difficult to establish that all of the Six Nations support action brought in the name of the Haudenosaunee. And, specifically, the lands at issue in this petition are only the Onondaga Nation lands, not the lands of any of the other Haudenosaunee Tribes. Notably, there has never been any land reserved to the Haudenosaunee as such. The United States suggests that this petition should be considered as having been submitted by and for the Onondaga Nation alone.

[2] The United States has consistently maintained that the American Declaration of the Rights and Duties of Man ("American Declaration") is a nonbinding instrument and does not create legal rights or impose legal duties on member States of the Organization of American States ("OAS"). U.S. federal courts of appeals have independently held that the American Declaration is nonbinding and that the Commission's decisions do not bind the United States. *See, e.g.*, Mitchell v. United States, 971 F.3d 1081, 1084 (9th Cir. 2020); *accord, e.g.*, Garza v. Lapin 253 F.3d 918, 925 (7th Cir. 2001); Flores-Nova v. Attorney General of the United States, 652 F.3d 488, 493–94 (3rd Cir. 2011); In re Hicks, 375 F.3d 1237, 1241 n.2 (11th Cir. 2004). As explained by the U.S. Court of Appeals for the Seventh Circuit in Garza, "[n]othing in the OAS Charter suggests an intention that member states will be bound by the Commission's decisions before the American Convention [on Human Rights] goes into effect. To the contrary, the OAS Charter's reference to the Convention shows that the signatories to the Charter intended to leave for another day any agreement to create an international human rights organization with the power to bind members. The language of the Commission's statute similarly shows that the Commission does not have the power to bind member states." *Accord* Commission's Statute, art. 20 (setting forth recommendatory but not binding powers). As the American Declaration is a non-binding instrument and does not create legal rights or impose legal duties on member States of the OAS, the United States understands that a "violation" in this context means an allegation that a country has not lived up to its political commitment to uphold the American Declaration. The United States respects its political commitment to uphold the American Declaration. For a further discussion of the U.S. position regarding the nonbinding nature of the American Declaration, *see* Request for an Advisory Opinion Submitted by the Government of Colombia to the Inter-American Court of Human Rights Concerning the Normative Status of the American Declaration of the Rights and Duties of Man, Observations of the United States of America, 1988.

[3] Petition at 28, ¶ 141.

The Petition is inadmissible and does not demonstrate a failure by the United States to live up to its commitments under the American Declaration. As set out below, the courts of the United States[4] have assessed Petitioners' claims at great length in multiple lawsuits and have concluded that Petitioners are not entitled to relief as either a matter of law or equity. Because the courts have fully adjudicated the issues raised in the Petition, the Commission's "Fourth Instance Formula" applies. Accordingly, the United States respectfully requests that the Commission find the Petition inadmissible.

Should the Commission nevertheless declare the Petition admissible and examine its merits, or should it defer its examination of the Petition's admissibility until its review of the merits under Article 36(3) of the Rules of Procedure ("Rules"), the United States urges it to find the Petition without merit and deny the Petitioners' request for relief.

A. FACTUAL AND PROCEDURAL BACKGROUND

For purposes of responding to this Petition, the United States does not the dispute the factual background set out by Petitioners regarding the reservation and alienation of their lands. The Petition alleges that much of central New York was promised to the Six Nations of the Haudenosaunee via the Treaty of Fort Stanwix, 7 Stat. 15 (1784), reaffirmed in the Treaty of Fort Harmar, 7 Stat. 33 (1789). The vast majority of the Onondaga Nation reserved lands (approximately 2 million acres) was transferred to New York State via the Treaty of Fort Schuyler (1788).[5] In 1790, the United States enacted the Indian Trade and Intercourse Act, which provided that no sale of Indian lands would be valid unless such transfer was carried out "under the authority of the United States."[6] In 1793, the State of New York purportedly purchased 230,000 acres of the Onondaga Nation's remaining lands.[7] Petitioners assert that the Onondaga Nation disputed the validity of the 1788 and 1793 transactions at the time they were purportedly carried out.[8] In 1794, the Six Nations and the United States entered into the Treaty of Canandaigua, which provided that "[t]he United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New-York, and called their reservations."[9] Petitioners assert that the State of New York purported to purchase Onondaga Lake and a one-mile strip around the Lake in 1795.[10] Petitioners assert that the Onondaga Nation disputed the validity of the transactions at the time.[11] Petitioners assert

[4] For the purposes of this response, any references to "courts of the United States" or "Federal courts" refer to United States federal courts.
[5] Petition, ¶ 41. A copy of the treaty is appended to this response as Attachment 6.
[6] 1 Stat. 137 (1790).
[7] Petition, ¶ 46
[8] Petition, ¶¶ 42 – 48.
[9] 7 Stat. 44, 45 (1794).
[10] Petition, at ¶ 49.
[11] *Id*. at ¶ 50, quoting objections stated in 1796.

that the State of New York made additional purchases in 1817 and 1822, totaling about 1,100 acres.[12]

Petitioners assert that all of the transactions by which the Onondaga Nation's lands were purportedly transferred to the State of New York were invalid under federal law. As Plaintiffs in Federal court litigation, the Petitioners have asserted that all of the approximately 2.5 million acres originally set aside for them remain the property of the Onondaga Nation.[13]

Other constituent Tribes of the Haudenosaunee Confederacy have litigated comparable claims in United States courts. Very protracted litigation by the Oneida Indian Nation and the Cayuga Indian Nation explored at length the facts and law relevant to these Haudenosaunee land claims. The precedents set by those lawsuits controlled the outcome of Petitioners' lawsuit, filed in 2005.

In 1970, successor Tribes to the Oneida Indian Nation filed suit seeking rental payments (for two recent years) from two counties located on the Oneida's aboriginal lands.[14] The district court, affirmed by the United States Court of Appeals for the Second Circuit, denied the Oneida's claim, on the long-established rule that an action in ejectment is a state-law action over which a federal court cannot exercise jurisdiction.[15] In a landmark ruling, the United States Supreme Court reversed the lower courts. *Oneida Indian Nation of New York State v. County of Oneida, New York*, (Oneida I).[16] The Court found that the Oneida's complaint "asserted a current right to possession conferred by federal law, wholly independent of state law."[17] Thus in Oneida I, the Supreme Court ruled that federal courts have jurisdiction to hear claims by Tribes challenging alienation of title in violation of treaties and the Trade and Intercourse Act.

On remand from the Supreme Court, the district court set forth a number of rulings in favor of the plaintiff Tribes.[18] The court found, among other things, that the Tribes had established a prima facie case under the Trade and Intercourse Act; that the Oneida had never abandoned their aboriginal lands ("[T]he Oneida Indians never abandoned their claim to their aboriginal homeland. The small area of land they now occupy lies within the boundaries of the aboriginal land. Furthermore, they never acquiesced in the loss of their land, but have continued to protest its diminishment up until today."); that the passage of time did not bar the suit

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[12] *Ibid.*
[13] First Amended Complaint, *Onondaga Nation v. State of New York*, Case no. 5:05-cv-00314, at ¶ 2 (N.D.N.Y. filed Aug. 1, 2005).
[14] The court noted the 1790 alienation of five million acres of Oneida land, but the suit addressed only the lands alienated in 1795. *See Oneida Indian Nation of New York v. Oneida County*, 464 F.2d 916, 919 (2nd Cir. 1972).
[15] *See generally Id.*
[16] 414 U.S. 661 (1974).
[17] *Id.* at 666.
[18] A third successor, the Oneida of the Thames (Canada) had been joined to the case. *Oneida*, 434 F. Supp. 527, 532 (N.D.N.Y. 1977).

("[r]estrictions on the alienation of Indian land, which have their origin either in treaties or in land patents, are not weakened by the passage of time."); and that neither the United States nor the State of New York were indispensable parties. The Second Circuit affirmed the district court's finding of liability under federal common law and the Trade and Intercourse Act, based on the invalid alienation of the Oneida lands in 1795.[19] The Supreme Court affirmed the Circuit Court's ruling, holding that the Tribes could maintain their action for violation of their possessory rights on the basis of federal common law. The Court specifically declined to address whether the Tribes could bring their claim on the basis of violation of the Trade and Intercourse Act. *County of Oneida, New York, v. Oneida Indian Nation of New York State*, (Oneida II).[20] The Court also specifically declined to rule on whether the Tribes' claims were barred by laches.[21]

Subsequently, the Oneida Indian Nation of New York purchased two parcels of land within its historical reservation, then refused to pay New York State and local property taxes, on the theory that the Tribe had restored its tribal sovereignty over the parcels. When the local jurisdictions threatened to foreclose on the properties, the Oneida filed suit seeking to enjoin the imposition of taxes. The City responded by suing to evict the Tribe and its council members from the properties. The district court consolidated the cases, and ruled that the parcels in question were within the reservation lands confirmed to the Oneida in the Treaty of Canandaigua; that Congress has never disestablished or diminished that reservation; that the land therefore remains "Indian country"; and therefore the City could not levy taxes against the Tribe.[22] The Second Circuit affirmed in part and vacated the judgment.[23] The City appealed.

In 2005, twenty years after issuing Oneida II, which held that tribes could challenge the validity of the alienation of their reservation lands, the Supreme Court concluded:

> Given the longstanding, distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and the Oneidas' long delay in seeking judicial relief against parties other than the United States, we hold that the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue. The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders.

City of Sherrill v. Oneida Indian Nation (Sherrill).[24] After noting the various harms that would likely flow if Oneida were able to "unilaterally reassert sovereign control and remove

[19] *Oneida*, 719 F.2d 525 (2nd Cir. 1983).
[20] 470 U.S. 226, 233 (1985) (Oneida II).
[21] 470 U.S. at 245.
[22] *Oneida Indian Nation v. City of Sherrill*, 145 F. Supp. 2d 226 (N.D.N.Y. 2001).
[23] *Oneida*, 337 F.3d, 139 (2nd Cir. 2003).
[24] *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 202-03 (2005) (*rehearing denied*, 544 U.S. 1057 (2005)).

these parcels from the local tax rolls," the Supreme Court noted that federal law, and the Department of the Interior's regulations implementing that law, provide a mechanism by which a Tribe can acquire trust lands over which it exercises sovereign authority. Importantly, the regulatory mechanism requires the Secretary of the Interior to consider the impact that taking the land into trust would have on local jurisdictions.[25]

In fact, shortly after the Supreme Court issued its decision in *Sherrill*, the Oneida Indian Nation made use of the regulatory mechanism for acquiring trust lands. In 2008, the Secretary of the Interior took approximately 13,000 acres of land into trust for the Oneida Indian Nation. [26]

In sum: the Oneida Indian Nation began in 1970 to litigate the issues of whether a Haudenosaunee Tribe could recover by court order sovereign authority over lands invalidly alienated in the 18th and early 19th centuries. Through decades of litigation, and multiple decisions by the federal district court, the court of appeals, and the Supreme Court, every facet of the issue was argued and decided. The Supreme Court ruled in 1985 that such tribes could bring a claim to court under federal common law; but the Court's 2005 decision held that, in consideration of the long passage of time and settled expectations of those currently in possession, equitable considerations precluded court-ordered return of sovereign authority over the Tribe's historic lands.

The aboriginal lands of the Oneida lay just to the east of the Onondaga Nation. Immediately to the west of the Onondaga Nation are the lands of the Cayuga. In 1980 - ten years after the Oneida filed their initial lawsuit, and twenty-five years before the Onondaga Nation filed suit – the Cayuga filed a land rights action in federal court. Premised on the same law, and parallel facts, as those invoked by the Onondaga Nation in the Petition, the Cayuga sought "a declaration of their current ownership of and right to possess a 64,015 acre tract of land in central New York State, an award of fair rental value for the almost 200 years during which they have been out of possession, and other monetary and protective relief."[27] In 1990, the district court ruled that the land transfers set out in the 1795 and 1807 Treaties with the State of New York violated the Indian Trade and Intercourse Act, and therefore were invalid.[28] In 1991, the district court ruled that the defense of laches was unavailable.[29]

In 1999, the district court issued a carefully considered decision concluding that Cayuga's ejectment claim must be dismissed on equitable grounds.[30] The court ruled that the only relief available to Cayuga was money damages. On February 17, 2000, a jury found the

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[25] *Id*. at 221.
[26] *Upstate Citizens for Equality, Inc v. United States*, 841 F.3d 556, 563-64 (2nd Cir. 2016).
[27] *See Cayuga Indian Nation v. Cuomo*, 565 F. Supp. 1297, 1301 (N.D.N.Y. 1983).
[28] *Cayuga*, 730 F. Supp. 485 (N.D.N.Y. 1990).
[29] *Cayuga*, 771 F. Supp. 19 (N.D.N.Y. 1991).
[30] Order, *Cayuga Indian Nation v. Cuomo*, Nos. 80–CV–930, 80–CV–960, 1999 WL 509442 (N.D.N.Y., July 1, 1999) (granting defendants' *Motion in Limine* finding plaintiff was precluded from seeking ejectment).

State of New York liable to the Cayuga in the total amount of $36,911,672.62.[31] On October 10, 2001, the district court rendered its final judgment in favor of Cayuga totaling $247,911,999.42.[32]

The State appealed the judgment, and Cayuga cross-appealed the ruling denying ejectment. In 2005, the Second Circuit applied and extended the Supreme Court's then-recent decision in *Sherrill*, invoking equitable considerations to not only affirm the district court's denial of Cayuga's request for ejectment, but to reverse the damages judgment against the State.[33] Thus, between 1980 and 2005, the Cayuga Indian Nation fully litigated its claims alleging wrongful alienation of its reservation lands.

In 2005, the Onondaga Nation first filed their suit asking the court to declare that the entire 2.5 million acre aboriginal reservation of the Onondaga Nation "remains the property of the Onondaga Nation and the Haudenosaunee, and that the Onondaga Nation and Haudenosaunee continue to hold title to the subject land."[34] The district court and Second Circuit found the questions presented by the Petitioners to be the same as those raised by the Oneida and Cayuga and, applying the controlling law established in those lengthy and comprehensive precedents, dismissed the Onondaga Nation's suit on the basis that the Supreme Court had already ruled that it would be inequitable to grant the requested relief.[35]

B. DISCUSSION

For a petition to be admissible before the Commission, it must satisfy the requirements of the Rules. Article 34(a) of the Rules provides that "[t]he Commission shall declare any petition or case inadmissible when … it does not state facts that tend to establish a violation of the rights referred to in Article 27 of these Rules of Procedure … ." Article 27, in turn, directs the Commission to "consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights and other applicable instruments … ." For the United States, the American Declaration is the only "applicable instrument."[36]

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[31] *See Cayuga v. Pataki*, 165 F. Supp. 2d 266, 271 (N.D.N.Y. 2001).
[32] *Id*. at 366.
[33] *Cayuga v. Pataki*, 413 F.3d 266 (2nd Cir. 2005), *cert denied* 547 U.S. 1148 (2006).
[34] First Amended Complaint, *Onondaga Nation v. New York*, Case no. 5:05-cv-00314, Doc. 20, at 16 (N.D.N.Y. Aug. 1, 2005). See also paragraphs 17 through 20, describing the "subject lands."
[35] "*Sherrill, Cayuga* and *Oneida* foreclose any possibility that the Onondaga Nation's action may prevail; the Court is bound by these precedents to find the Nation's claims equitably barred and subject to dismissal." Order, *Onondaga v. New York*, No. 5:05-cv-00314, 2005 WL 3806492, *7 (N.D.N.Y. Sep. 22, 2010). The Second Circuit affirmed, citing the same precedents. *Onondaga v. New York*, No. 10-4273, 500 Fed. Appx. 87 (2nd Cir. Dec. 21, 2012), *cert denied*, 571 U.S. 969 (2013).
[36] Article 20 of the Commission's Statute and Article 23 of the Rules identify the American Declaration as an applicable instrument with respect to nonparties to the American Convention. Although Article 23 of the Rules lists several additional instruments, the United States is not a party to any of those other instruments.

As explained below, the Commission should declare the Petition to be inadmissible because (1) the claims in the Petition are outside the Commission's competence *ratione temporis* and *ratione materiae*; (2) the arguments presented are unreviewable in light of the Commission's "fourth instance formula" as they amount to a disagreement with determinations of domestic authorities on these same issues, rendered in compliance with the American Declaration; and (3) Petitioners have not stated facts that tend to establish a violation of any rights in the American Declaration.

1. The Commission's Competence is Limited

a. Claims Related to the Loss of Land Between 1788 and 1822 are Inadmissible because they are Outside the Commission's Competence *Ratione Temporis.*

To the extent that the Petition presents claims relating to the Onondaga Nation's loss of land between 1788 and 1822, the Commission lacks jurisdiction because these events do not fall within the Commission's competence *ratione temporis*. These events occurred before the adoption of the American Declaration and the establishment of the Commission. The principle that relevant instruments, in this case the American Declaration, cannot be applied retroactively is well-established in Inter-American[37] and international[38] jurisprudence and has been consistently applied by the Commission to reject the consideration of claims that predate the commitments set forth in the instrument. For instance, in *Isamu Carlos Shibayama et al. v. United States*,[39] a petition that asked the Commission to consider alleged violations related to a World War II-era internment program, the Commission correctly concluded in its report on admissibility that these events were outside of its competence *ratione temporis*.[40] Here, the loss of land between 1788 and 1822 predates the Commission's competence as to claims brought

[37] *See, e.g.*, I.-A. Court H.R., *Alfonso Martín Del Campo Dodd Case*, Preliminary Objections, Judgment of September 3, 2004, Ser. C N° 113, (2004), ¶ 85 (holding that Court lacked competent *ratione temporis* because alleged events ceased to exist prior to Court having cognizance over supposed violations); I-.A. Comm. H.R., Report N° 62/03, P.12.049, *Kenneth Walker*, October 10, 2003, United States, Annual Report 2003, at ¶ 38 (Commission only competent *ratione temporis* to examine those complaints that allege facts that occurred "on or after the date on which the United States' [commitments] under the American Declaration took effect").

[38] *See, e.g.,* Vienna Convention on the Law of Treaties, 8 ILM 679, art. 28 ("Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party."); I.-A. Court H.R., *Cantos v. Argentina*, Preliminary Objections, Judgment of September 7, 2001, Ser. C N° 85, ¶ 37 (recognizing that principle of non-retroactivity of international norms is embodied in Vienna Convention). *See also R.A.V.N. v. Argentina*, Hum. Rts. Comm., Communication No. 343/1988 (5 April 1990), ¶ 2.3 (International Covenant on Civil and Political Rights "cannot be applied retroactively" and that the Committee is "precluded *ratione temporis*" from examining alleged violations of Covenant that occurred before Covenant entered into force for Argentina).

[39] Report N° 26/06, Petition 434-03, *Isamu Carlos Shibayama et al.*, United States, Admissibility, Annual Report 2006 (2006).

[40] *See id.* at ¶ 42.

against the United States, which began in 1951. Thus, the Commission does not have the competence *rationae temporis* to review Petitioners' claims related to this loss of land.

b. Claims based on Instruments beyond the American Declaration are Inadmissible because they are outside the Commission's Competence *Ratione Materiae.*

Although Petitioners anchor their claims in specific provisions of the American Declaration, in every instance, they attempt to expand the competence of the Commission by invoking an array of other international instruments to substantiate their claims that international legal obligations have been violated. Such recourse to international instruments and authorities beyond the American Declaration reflects the reality that Petitioners' claims do not implicate provisions of the American Declaration, leaving them to look to other instruments in their attempt to construe cognizable claims. As a result, the Commission lacks the competence *ratione materiae* to entertain the claims contained in the Petition.

Under Article 34(a), the Commission may only consider petitions that state facts tending to establish a violation of the rights referred to in Article 27 of the Rules. Article 27, in turn, directs the Commission to "consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights [('American Convention')] and other applicable instruments … ." Article 20 of the Commission's Statute and Article 23 of the Rules identify the American Declaration as an "applicable instrument" with respect to nonparties to the American Convention such as the United States. The United States is not a party to any of the other instruments listed in Article 23, and in any event, Article 23 does not list various instruments and bodies Petitioners rely on to articulate their claims. Consequently, the Commission lacks competence to apply any instrument beyond the American Declaration with respect to the United States.[41] As such, Petitioners' claims, which at base are rooted in these instruments, are inadmissible under Article 34(a) as outside the Commission's competence.

c. The American Declaration does not Speak to Collective Rights and the Commission Lacks Competence to Extend its Review Beyond the American Declaration

Specifically, Petitioners' claims are not admissible because the American Declaration does not speak to collective rights and the Commission lacks competence to expand its review beyond the Declaration. The American Declaration sets forth human rights, fundamental freedoms, and duties of individuals, not of collectives. This fact is evidenced in the Declaration's

[41] *See, e.g.*, U.S. Hearing Presentation, Ameziane v. United States, Case No. 12.865, 164th Period of Sessions, Mexico City, Sept. 7, 2017 ("*Ameziane* U.S. Hearing Presentation"), *available at* https://www.youtube.com/watch?v=sbN4tBcBbtQ (U.S. delegation providing legal reasons for Commission's lack of competence over extraneous instruments).

plain text. The articles cited in the Petition begin with the words "[e]very human being,"[42] "[a]ll persons,"[43] "[e]very person,"[44] or "[e]very accused person."[45] All of the other rights, and all of the duties, similarly begin with language referring to individual persons.[46] As such, these articles, on their face, do not set forth rights pertaining to collectives like the Onondaga Nation.

Moreover, the Commission must decline to review the Petition through the rubric of the UNDRIP because it lacks competence to apply any instrument beyond the American Declaration with respect to the United States.[47] *A fortiori*, the Commission lacks competence to apply provisions in such instruments setting forth collective rights, such as the many articles of the UNDRIP declaring collective rights of indigenous peoples. These collective rights, while important, must be contrasted with the human rights enjoyed and exercised by indigenous *individuals* and all other individuals by virtue of having been "born free and equal, in dignity and in rights, … endowed by nature with reason and conscience," and which are the rights recognized and protected by the American Declaration.[48]

Furthermore, the UNDRIP consists of aspirational statements of political and moral commitment, and are not binding under international law. The instrument was not intended to

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[42] American Declaration, art. I.

[43] *Id*. at art. II.

[44] *Id*. at art. III, XIII, XIX.

[45] *Id*. at art. XXVI.

[46] Because the United States is not a party to the American Convention, the Commission's jurisdiction with respect to the United States is limited to claims grounded in the American Declaration. *See, e.g.*, Commission Statute, art. 20. Even if the Commission were to look to the American Convention, it would have to conclude that the American Convention is similarly limited to safeguarding the human rights and fundamental freedoms of individual human beings, and does not apply to collectives such as indigenous peoples. American Convention, art. 1(2) (defining "person" as every human being).

[47] *See, e.g.*, U.S. Hearing Presentation, Ameziane v. United States, Case No. 12.865, 164th Period of Sessions, Mexico City, Sept. 7, 2017 ("*Ameziane* U.S. Hearing Presentation"), *available at* <https://www.youtube.com/watch?v=sbN4tBcBbtQ> (U.S. delegation providing legal reasons for Commission's lack of competence over extraneous instruments).

[48] American Declaration, pmbl. ¶ 1. *See also, e.g.*, "U.S. Announcement of Support for the United Nations Declaration on the Rights of Indigenous Peoples," *reprinted in* DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 265 (Elizabeth R. Wilcox ed., 2010) ("U.S. Announcement of Support"), *available at* <https://www.state.gov/documents/organization/179316.pdf>. *See also, e.g.*, U.N. GAOR, 61st Sess., 107th plen. mtg. at 21, U.N. Doc. A/61/PV.107 (Sept. 13, 2007) ("UNDRIP Vote Record Part I") (United Kingdom at UNDRIP's adoption stating that "since equality and universality are the fundamental principles underpinning human rights, we do not accept that some groups in society should benefit from human rights that are not available to others," and that "[w]ith the exception of the right to self-determination, we therefore do not accept the concept of collective human rights in international law"); *id.* at 24–25 ("The Swedish Government has no difficulty in recognizing collective rights outside the framework of human rights law" but "it is the firm opinion of the Swedish Government that individual human rights prevail over the collective rights mentioned in the Declaration."); U.N. GAOR, 61st Sess., 108th plen. mtg. at 5, U.N. Doc. A/61/PV.108 (Sept. 13, 2007) ("UNDRIP Vote Record Part II") (Slovakia stressing that "international human rights protection is based on the principle of the individual character of human rights"; that the UNDRIP "clearly distinguishes between the individual character of the human rights of indigenous individuals and the collective rights indispensable for their existence, well-being and integral development as peoples"; and that "[t]hose collective rights should not be considered as human rights").

create new international law, nor does it reflection States' existing obligations under conventional or customary international law.[49] The United States supports the instrument as explained in its December 2010 Announcement of Support, recognizes its significant moral and political force, and looks to the principles of the UNDRIP in its dealings with federally recognized tribes.[50] However U.S. support for the UNDRIP did not change the U.S. domestic legal framework with respect to tribal rights.

2. The "Fourth Instance Formula" precludes Commission review of United States court decisions in this case

The Haudenosaunee land claims have been given very extensive and thorough exploration by United States federal courts.[51] For over fifty years, federal courts, including the United States Supreme Court, have scrutinized the issue and determined that federal courts cannot order the return of title to the Tribes. Petitioners are asking the Commission to sit in

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[49] *See e.g.*, "Indigenous Issues," DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 264 (Elizabeth R. Wilcox, ed., 2010) ("U.S. Announcement of Support") ("The United States supports the Declaration, which—while not legally binding or a statement of current international law—has both moral and political force."); "American Declaration on the Rights of Indigenous Peoples," DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 251–52 (CarrieLyn D. Guymon ed., 2016) ("U.S. Objections to OAS DRIP") (noting that the OAS DRIP is not legally binding and does not create new law), *available at* <https://www.state.gov/documents/organization/272128.pdf>. *See also*, *e.g.*, UN Vote Record Part I, *supra n.* 48, at 12–15, 17, 22, 26 (United Kingdom, Colombia, Guyana, Australia, Canada, and New Zealand stating that UNDRIP is not binding); *id*. at 12–13, 17 (Australia, Colombia, and Canada adding that UNDRIP does not reflect customary international law); UN Vote Record Part II, *supra n.* 48, at 3, 5 (Nepal and Turkey delegates stating that UNDRIP is not binding).

[50] *See id*., at 264.

[51] The United States does not dispute that Petitioners have pursued their property claims in U.S. federal courts. However, the United States notes that there exist additional avenues of redress in the United States that the Onondaga Nation did not pursue. First, Congress provided a means for all tribes to seek monetary compensation for wrongful loss of lands by enacting the Indian Claims Commission Act of 1946 (ICCA). *See* 60 Stat. 1049 (Aug. 13, 1946). It is true that the only remedy available from the ICC was money damages, and the Onondaga Nation asserts that "[s]eeking money damages has never been a priority." 2017 Response, Ex. B. *Declaration* of Sidney Hill, at ¶ 40. Nov. 15, 2006. Nonetheless, the ICC was created for the specific purpose of providing redress to Indian tribes for historical wrongs. Onondaga Nation's election to disclaim money damages was a choice available to them; but that choice does not nullify the ICC as a means of redress that was available to the Onondaga Nation. Second, beginning in 1881, Congress began passing special jurisdictional statutes vesting the United States Court of Claims with jurisdiction to hear claims like that of Petitioners. *See* Final Report of the Indian Claims Commission, 1978, at 2; citing 21 Stat 504 (Mar. 3, 1881) (An Act for the ascertainment of the amount due the Choctaw Nation). Such legislation was an avenue of relief that the Onondaga Nation does not claim to have pursued. Finally, while the United States does not believe that there remain any mechanisms by which the Onondaga Nation can compel the relief it seeks, there are at least two non-compulsory mechanisms that Onondaga Nation may pursue. As illustrated by the discussion regarding the Oneida Indian Nation, above, the Secretary of the Interior's regulations (25 CFR part 151) include procedures that implement the land-into-trust provisions of the Indian Reorganization Act (48 Stat. 984 (1934); 25 U.S.C. 5108). Onondaga Nation, like the Oneida, may pursue reacquisition of its traditional lands via the Part 151 process. In addition, Congress has the ability to enact legislation allocating appropriated funds for the purpose of acquiring lands for specific Indian Tribes. See, e.g., the Maine Indian Claims Settlement Act of 1980, 94 Stat. 1785. The Onondaga Nation can petition Congress for legislation to fund the recovery of Onondaga Nation lands. In fact, in 2022 the Onondaga Nation, in cooperation with the United States and New York State, recovered possession of more than 1,000 acres of its traditional lands. *See* https://wskg.org/landmark-agreement-to-see-1000-acres-of-land-returned-to-onondaga-nation/ (last accessed Jul. 18, 2022).

appellate review of the United States courts. Therefore, the Petition is inadmissible under the Commission's well established Fourth Instance Formula.

The Fourth Instance Formula recognizes the proper role of the Commission as subsidiary to States' domestic judiciaries, and indeed, nothing in the American Declaration, the OAS Charter, the Commission's Statute, or the Rules gives the Commission the authority to act as an appellate body. The Commission has elaborated on the limitations that underpin the fourth instance formula in the following terms: "The Commission … lacks jurisdiction to substitute its judgment for that of the national courts on matters that involve the interpretation and explanation of domestic law or the evaluation of the facts."[52]

The issues raised by Petitioners have been fully adjudicated before the courts of the United States and the Petitioner has actively participated in some of that litigation. There has been no failure by the United States to live up to its political commitments under the American Declaration with respect to Petitioners' rights. The Commission has repeatedly stated that it may not "serve as an appellate court to examine alleged errors of internal law or fact that may have been committed by the domestic courts acting within their jurisdiction." [53]

It is not the Commission's place to sit in judgment as another layer of appeal, second-guessing the considered decisions of a State's domestic courts in weighing evidence and applying domestic law, nor does the Commission have the resources or requisite expertise to perform such a task. The United States' judicial process afforded Petitioners the opportunity to make their arguments to a competent tribunal, and as demonstrated above, has done so for decades in multiple lawsuits brought by many New York tribes.

After defeat in the district court and Court of Appeals, Petitioners asked the U.S. Supreme Court to review the case but the Supreme Court denied their request. Dissatisfied with the outcome of these exhaustive domestic proceedings, Petitioners now ask the Commission to reexamine the federal courts' determinations. Petitioners raise the same issues before the Commission that they presented in their complaint in federal court.

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[52] Macedo García de Uribe v. Mexico, Petition No. 859-03, Report No. 24/12, Inadmissibility, Mar. 20, 2012, ¶ 40 ("*Macedo* Inadmissibility Report"). The Commission has interpreted and applied the fourth instance formula in the same way for OAS Member States that are parties to the legally binding American Convention and for those, including the United States, for which review is instead undertaken pursuant to the nonbinding American Declaration, where there must be even more deference. *See, e.g., id*. ("The judicial protection afforded by the [American] Convention [on Human Rights] includes the right to fair, impartial, and prompt proceedings which give rise to the possibility, *but never the guarantee*, of a favorable outcome. Thus, the interpretation of the law, the relevant proceeding, and the weighing of the evidence is, among others, a function to be exercised by the domestic jurisdiction, which cannot be replaced by the IACHR." (emphasis added)).

[53] *Marzioni v. Argentina*, Case no. 11.673, Report No. 39/96, Inadmissibility, Oct. 15, 1996, ¶ 51 ("*Marzioni* Inadmissibility Report").

The Commission has long recognized that "if [a petition] contains nothing but the allegation that the decision [by a domestic court] was wrong or unjust in itself, the petition must be dismissed under [the fourth instance] formula."[54] The Commission must consequently decline Petitioners' invitation to sit as a court of fourth instance. Acting to the contrary would amount to the Commission second-guessing the legal and factual determinations of the United States Supreme Court and lower courts, reached after legal proceedings conducted in conformity with due process protections under U.S. law, U.S. commitments under the American Declaration, and otherwise in accordance with U.S. commitments and obligations under international human rights instruments. It would also require the Commission to reweigh evidence, something the Commission, by its own admission, cannot do.[55]

Petitioners received abundant opportunity to raise the very issues presented to the Commission in domestic proceedings and fully availed themselves of that opportunity. While Petitioners are unhappy with the outcome, the judicial process functioned as it should have in this matter. This is a compelling case for the application of the fourth instance formula.

3. Failure to State a Claim under the American Declaration

The Petition is also inadmissible under Article 34 of the Rules because it does not state facts that establish a violation of the American Declaration.

As a preliminary matter, the United States notes that Petitioners invoke the matter of *Mary and Carrie Dann* throughout their Petition. They assert that "the domestic legal processes available to the Onondaga Nation fail to meet the standard required by the Commission in the Dann case[56] to protect indigenous peoples' rights to property, equality, and judicial protection."[57] While the United States acknowledges the Commission's non-binding Merits Report and its recommendations in *Mary and Carrie Dann*,[58] as previously stated, the United States does not agree with the Report.[59] Moreover, the United States notes that the facts in *Dann* are easily distinguishable and it does not support Petitioners' claims.

The Dann sisters were Western Shoshone Indians, occupying and using ranch lands in Nevada that had been patented to their father.[60] Representatives of the Western Shoshone

[54] *Marzioni* Inadmissibility Report, ¶ 51; *accord* Maldonado Manzanilla v. Mexico, Petition No. 733-04, Report No. 87/07, Inadmissibility, Oct. 17, 2007, ¶ 58 (reiterating that "the fact that the outcome was unfavorable … does not constitute a [rights] violation") (quoting and citing Rodríguez v. Argentina, Case No. 10.382, Report No. 6/98, Inadmissibility, Feb. 21, 1998, ¶ 71).
[55] *Macedo* Inadmissibility Report, ¶ 40.
[56] Mary and Carrie Dann, Case No. 11.140, Report No. 75/02, Dec. 27, 2002 [hereafter "Dann Report"].
[57] Petition at ¶ 141.
[58] Dann Report, *supra* note 56.
[59] *See,* Dann v. United States, Observations of the United States to the IACHR Report No. 113/01, Dec. 17, 2001. A copy of the response filed by the United States in the *Dann* case is appended to this response as Attachment 5.
[60] Dann Report at ¶ 3.

Indians presented a claim to the Indian Claims Commission (ICC), seeking compensation for their treaty lands that were wrongfully taken by the United States. The Dann sisters were denied participation in the claim.[61] The ICC awarded damages to the Western Shoshone for the taking of their lands, including the lands used and occupied by the Dann sisters.[62]

On the premise that the Western Shoshone damages award extinguished all Indian title to the lands at issue, including the Dann sisters' ranch, the United States deemed the Dann sisters to be trespassing, and initiated proceedings to impound their cattle.[63] The Commission concluded that the Dann sisters were denied the opportunity to protect their interests in the proceedings before the ICC and Court of Claims.[64] The Commission found that, by purporting to divest aboriginal people of their property rights to land on which they currently reside and which they currently use via procedures from which the aboriginal people were excluded, the judicial processes of the United States violated property right and equal treatment rights protected by the American Declaration.[65]

In utter contrast, the Onondaga Nation brought suit in federal court on its own behalf, and litigated it fully. Moreover, the Onondaga Nation was seeking the court's declaration that the Onondaga Nation held title to millions of acres of land that the Onondaga Nation had not possessed for more than 150 years – unlike the Dann sisters, who sought to protect their right to continue occupying and using their own land. Because of the dissimilarity of facts, the Commission's ruling on the Dann sisters' petition provides no support for these Petitioners.

Furthermore, as detailed below, even apart from their misplaced reliance on *Dann*, Petitioners have failed to state facts that establish a violation of the American Declaration.

a. Article XXIII (Right to property)

Article XXIII of the American Declaration provides that "[e]very person has a right to own such private property as meets the essential needs of decent living and help to maintain the dignity of the individual and of the home." Petitioners allege that "[t]he Nation's historical, spiritual, and cultural relationship with its lands has been severed in violation of the law, but the federal court ruling applied to the Nation prevents it from obtaining redress of any kind through the U.S. judicial system."[66] However, Article XXIII sets forth the rights of individuals and does not speak to collective rights. This fact is evidenced in the Article's plain text: "[e]very person,"

[61] *Id*. at ¶¶ 56-57.
[62] *Id*. at ¶ 3.
[63] *Id.* at ¶ 16.
[64] *Id*. at ¶ 165.
[65] *Id.* at ¶¶171-172.
[66] Petition at 31-32.

and "dignity of the individual."[67] As such, Article XXIII, on its face, does not set forth a right pertaining to collectives like the Onondaga Nation, and thus Petitioners have failed to state a claim under Article XXIII of the American Declaration.

b. Article XVIII (Right to a fair trial)[68]

Article XVIII of the American Declaration provides that "[e]very person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights." Petitioners fail to articulate any violation of their right to resort to courts in the United States, as they detail in the Petition how they brought suit in federal court and litigated it fully. Petitioners' Article XVIII claim, which appears to be an attempt to allege that the U.S. courts' application of *stare decisis* and preclusion constitutes a denial of the right to fair trial, clearly amounts to an invitation to sit in appellate review of the U.S. courts. The fact that Petitioners were unsuccessful cannot constitute a denial of the right to resort to the courts. Article XVIII does not guarantee a successful outcome in litigation. Because Petitioners fail to state facts that establish a violation of the right to fair trial under the American Declaration and amounts to an invitation for the Commission to sit as a court of fourth instance, this claim is inadmissible.

c. Article II (Right to equality)

Article II of the Declaration provides that "[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor." Petitioners assert that the formulation of laches "applied to dismiss the Onondaga Nation's land rights action represent a new body of law that closes the courts of the United States to claims of historic violations of indigenous land rights,"[69] and that "this new equitable defense has not been applied to the land rights claims of non-Indians."[70] Petitioners also assert that "in no other area of federal law is the right to a remedy inversely related to the effect of the claim on the defendants."[71] These assertions are unsound.

Laches is a well-established principle, the purpose of which is to "avoid inequity."[72] Contrary to petitioners' assertions, laches has been invoked to support dismissal of historic land

[67] American Declaration, art. XXIII.

[68] Petitioners frame this claim as a "right to judicial protection," borrowing language from the American Convention on Human Rights. Because the American Declaration is the only instrument the Commission is competent to apply with respect to the United States, the United States has reframed this claim consistent with the language of the relevant article of the American Declaration.

[69] Petition at ¶ 126.

[70] *Id.* at ¶ 129.

[71] *Id*. at ¶ 132.

[72] *Galliher v. Cadwell*, 145 U.S. 368, 373 (1892).

claims by non-Indians. Indeed, in his dissent in *Oneida II*, Justice Stevens identified such a precedent, *Wetzel v. Minnesota Ry. Transfer Co.,* that rebuts Petitioners' assertions.[73] Additionally, in *Robins Island Preservation Fund, Inc. v. Southold Corp.*,[74] the Second Circuit Court of Appeals invoked laches in support of its affirmance of the district court's dismissal of a historic land claim brought by non-Indians.

Contrary to Petitioners' assertions, weighing the effect of the claim on the defendant is fundamental to laches analysis in all areas of law. Laches is an equitable doctrine that "requires a showing by the defendant that it has been prejudiced by the plaintiff's unreasonable delay in bringing the action. [but] mere lapse of time, without a showing of prejudice, will not sustain a defense of laches." [75] Thus a court's laches analysis requires a determination as to prejudicial effect of the plaintiff's claim on the defendant.

Petitioners have failed to show that the courts' application of laches to dismiss Onondaga Nation's claim seeking ownership of its 2.5 million acre aboriginal territory violated their right to equality.

* * *

For the foregoing reasons, the Petition is inadmissible under Article 34 of the Rules because it does not state facts that establish a violation of the American Declaration.

C. CONCLUSION

The Commission should declare the Petition to be inadmissible because it fails to meet the Commission's established criteria in Articles 31 and 34 of the Rules of Procedure. Claims presented in the Petition are beyond the *ratione temporis* and *ratione materiae* competence of the Commission. Additionally, because petitioners are asking the Commission to sit in appellate review of United States courts, including the U.S. Supreme Court, the Commission should find the petition inadmissible under the Commission's Fourth Instance Formula. Moreover, the Petition fails under Article 34 to state facts that tend to establish violations of rights set forth in the American Declaration. Should the Commission nevertheless declare the Petition admissible and examine its merits, the United States urges it to find the Petition without merit and deny Petitioners' request for relief.

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[73] *Oneida* II, 470 U.S. at 264, *citing Wetzel v. Minnesota Ry. Transfer Co.*, 169 U.S 327 (1898).
[74] *Robins Island Preservation Fund, Inc. v. Southold Corp.*, 959 F. 2d 409, 424 (2nd Cir. 1999) ("There must arrive a point at which title to land is settled. Overturning a two hundred year old chain of title would result in gross prejudice to SDC and the other successors-in-interest to the remainder of Joseph Parker Wickham's confiscated estate.").
[75] *Zuckerman v. Metropolitan Museum of Art*, 928 F.3d 186, 193 (2nd. Cir. 2019) (cleaned up).

ENCLOSURES

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500 Fed.Appx. 87
This case was not selected for publication in West s Federal Reporter.

United States Court of Appeals, Second Circuit.

ONONDAGA NATION, Plaintiff–Appellant,

v.

The State of NEW YORK, George Pataki, In his Individual Capacity and as Governor of New York State, Onondaga County, City of Syracuse, Honeywell International, Inc., Trigen Syracuse Energy Corporation, Clark Concrete Company, Inc., Valley Realty Development Company, Inc., and Hanson Aggregates North America, Defendants–Appellees.

No. 10–4273–cv

Oct. 19, 2012.

Rehearing and Rehearing En Banc Denied Dec. 21, 2012.

Synopsis

Background: Indian tribe brought action against State of New York to recover ancestral land. The United States District Court for the Northern District of New York, Kahn, J., 2010 WL 3806492, dismissed action. Tribe appealed.

The Court of Appeals held that equitable bar on recovery of ancestral land foreclosed tribe's claims.

Affirmed.

***88** Appeal from a judgment of the United States District Court for the Northern District of New York (Kahn, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be **AFFIRMED.**

Attorneys and Law Firms

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