

**PETITION  
to the  
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS**

**submitted by**

**THE ONONDAGA NATION and THE HAUDENOSAUNEE**

**against**

**THE UNITED STATES**

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**I. Introduction**

1. The ONONDAGA NATION (the “Nation”) hereby submits this Petition to the Inter-American Commission on Human Rights (the “Commission”) against the United States (the “State” or “U.S.”). The Nation is a sovereign Indigenous nation whose original homelands are situated in what is now central New York State in the United States. The Nation seeks redress for the violation of the rights of the Onondaga people to their lands, to equal treatment, and to judicial protection.<sup>1</sup>

2. The HAUDENOSAUNEE is a confederation of six sovereign Indigenous nations, of which the Onondaga Nation is one. The Central Council Fire, or seat of government, of the Haudenosaunee is at the Onondaga Nation near what is now Syracuse, New York.

3. Between 1788 and 1822 the State of New York, a political subdivision of the United States, took approximately 2.5 million acres of Onondaga Nation land in violation of federal law and treaties and in violation of the Nation’s own law. The courts of the United States have failed to provide any remedy for this loss of land. The United States domestic legal system’s denial of a remedy for violation of the Nation’s land rights and treaties is a violation of the Nation’s fundamental human rights protected by the American Declaration on the Rights and Duties of Man, the United Nations Declaration on the Rights of Indigenous Peoples and other international human rights agreements.

4. The failure of the United States’ legal system to provide a remedy for the loss of Onondaga Nation land has been disruptive to relationships between the Onondaga Nation and its neighbors, including the State of New York and the United States. The Nation brings this Petition to bring about a healing between themselves and all others who live in the region that has been the homeland of the Onondaga Nation since the dawn of time. The Nation and its people have a unique spiritual, cultural and historic relationship with the land, which is embodied in the Gayanashagowa, the Great Law of Peace. This relationship goes far beyond federal and state

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<sup>1</sup> Petitioner does not request that the identity of the Onondaga Nation or the Haudenosaunee be withheld from the United States.

legal concepts of ownership, possession or legal rights. The people are one with the land, and consider themselves stewards of it. It is the duty of the Nation's leaders to work for a healing of this land, to protect it, and to pass it on to future generations. The Onondaga Nation brings this Petition on behalf of its people in the hope that it may hasten the process of reconciliation and bring lasting justice, peace and respect among all who inhabit the area.

5. The Haudenosaunee Six Nations, including the Onondaga Nation, entered into three treaties with the United States: the 1784 Treaty of Fort Stanwix,<sup>2</sup> the 1789 Treaty of Fort Harmer,<sup>3</sup> and the 1794 Treaty of Canandaigua.<sup>4</sup> In these treaties, the United States affirmed the sovereignty of the Onondaga Nation, promised to protect Nation lands, and guaranteed the Nation the "free use and enjoyment" of its territory. Treaties are "the supreme law of the land" under Article VI of the United States Constitution, and yet the promises made in these treaties have been broken by the United States, most recently when the federal courts held there could be no remedy for the illegal taking of the Nation's lands by the State of New York.

## II. Jurisdiction

6. The Inter-American Commission on Human Rights has competence to receive and to act on this Petition in accordance with Articles 1.2 (b) and 24 of the Commission's Statute.

## III. Exhaustion of Domestic Remedies

7. Article 31 of the Commission's Rules of Procedure requires that the Commission verify whether "the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law."

8. The Nation has exhausted domestic remedies. As discussed below, the Nation filed its land rights action in the United States District Court on March 11, 2005, within the time provided for such suits under federal law. The federal court dismissed this action and the Nation appealed to the Second Circuit Court of Appeals, which affirmed that dismissal. The Nation filed a petition for a writ of *certiorari* with the United States Supreme Court seeking review of the dismissal and its affirmance, and on October 15, 2013, the Supreme Court denied that petition. No further remedy is available in the United States court system.

9. While Article 31 of the Commission's regulations generally requires that "the remedies of the domestic legal system have been pursued and exhausted," Article 31.2(a) allows for an exception to this general requirement where "the domestic legislation of the State

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<sup>2</sup> 7 Stat. 15, Annex 1.

<sup>3</sup> 7 Stat. 33, Annex 2.

<sup>4</sup> 7 Stat. 44, Annex 3.

concerned does not afford due process of law for protection of the right or rights that have allegedly been violated.”<sup>5</sup>

10. In the event the United States contends that domestic remedies have not been exhausted because the Nation has not filed suit against the United States directly, alleging that the failure of the federal courts to provide any remedy for the loss of the Nation’s lands violated United States law, the Nation argues in the alternative that exhaustion is not required. That is because, as contemplated by Article 31.2(a) of the Commission’s rules, no due process is afforded by the law of the United States for such suits against the United States.<sup>6</sup>

#### **IV. Timeliness**

11. Under Article 32 of the Commission’s Rules of Procedure, a Petition to the Commission must be lodged within six months of the notification of the final ruling that comprises the exhaustion of domestic remedies.<sup>7</sup> In this matter, the final ruling was issued on October 15, 2013, and Petitioners were notified that same day. The six month filing deadline is April 15, 2014. This Petition is timely.

#### **V. Per Saltum Review**

12. While a petition to the Commission is ordinarily “studied in the order it was received,”<sup>8</sup> the Commission’s Rules of Procedure provide for priority review in certain circumstances. Expedited evaluation is warranted either where “the decision could have the effect of repairing serious structural situations that would have an impact in the enjoyment of human

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<sup>5</sup> Article 31, 31.2(a), Commission Rules of Procedure.

<sup>6</sup> See, e.g., *Shinnecock Indian Nation v. United States*, 112 Fed. Cl. 369, 374 (Fed. Cl. 2013) (holding that an Indian nation whose lands had been taken by the State of New York in violation of federal law had no legal recourse against the United States for its failure to provide a remedy). See also Case 11.140, Report No. 75/02, *Mary and Carrie Dann v. United States*, December 27, 2002 (hereinafter “Dann Report”) (holding that domestic judicial processes available to indigenous peoples in the United States for claims against the United States for loss of indigenous lands failed to meet the requirements of the American Declaration); Case No. 1490-05, Report No. 52/07 (Admissibility), *Gonzalez v. United States*, July 24, 2007, at para. 49 (holding that proceedings with “no reasonable prospect of success” could not be considered “effective” as required by international law, and need not be pursued under the Commission’s rules).

<sup>7</sup> Article 32, Commission Rules of Procedure.

<sup>8</sup> Article 29(2), Commission Rules of Procedure.

rights”<sup>9</sup> or where “the decision could promote changes in legislation or state practices and avoid the reception of multiple petitions on the same matter.”<sup>10</sup> Both circumstances are present here.

13. As demonstrated below, the federal courts of the United States have recently developed a rule that has been applied to deny Indian nations any remedy for illegal takings of their lands.<sup>11</sup> This new rule does not apply solely to the Onondaga Nation and the Haudenosaunee, but to other Indian nations as well. The rule constitutes a “serious structural situation” that, unless repaired, may impact the human rights of Indian nations and communities throughout the United States. Per saltum review pursuant to Article 29(2)(d)(i) is therefore warranted.

14. Further, petitioners believe that the relief requested in this petition could help to avoid multiple petitions to the Commission regarding the United States courts’ new legal rule, by promoting changes in legislation or state practice to ensure that indigenous peoples in the United States have access to effective remedies for the loss of their lands. Such prevention of multiple petitions justifies per saltum review pursuant to Commission Rule of Procedure 29(2)(d)(ii).

## **VI. Absence of Parallel International Proceedings**

15. The subject of this Petition is not pending in any other international proceeding for settlement.

## **VII. The Victims and the Petitioners**

16. The victims in this case are the Onondaga Nation and the Onondaga people, whose land, cultural life, spiritual life and physical well-being have been and are being adversely affected by the acts and omissions complained of in this Petition. The Petitioners are the Onondaga Nation and the Haudenosaunee (hereafter “Petitioner” or “Petitioners”). The Onondaga Nation is a sovereign Indian nation recognized by the United States in treaties as an Indian nation entitled to the protections of federal law.<sup>12</sup>

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<sup>9</sup> Article 29(2)(d)(i), Commission Rules of Procedure.

<sup>10</sup> Article 29(2)(d)(ii), Commission Rules of Procedure.

<sup>11</sup> As discussed below, a number of the issues identified in the Commission’s 2009 report on indigenous lands are implicated in this case. *See* IACHR, Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources. Norms and Jurisprudence of the Inter-American Human Rights System. OEA/Ser.L/V/II.Doc.56/09, December 30, 2009 (“Indigenous Lands Report”).

<sup>12</sup> *See* 78 Fed. Reg. 26384, 26387 (May 6, 2013) (affirming United States’ recognition of the Onondaga Nation); H. R. Con. Res. 331, 110<sup>th</sup> Cong. (1988) (acknowledging “the contribution of the [Haudenosaunee] Iroquois Confederacy of Nations to the development of the United States Constitution”).

17. For many centuries, the Onondaga people have occupied, hunted, fished and gathered throughout their original territory, which is located in what has become the center of New York State. This land is the aboriginal property of the Nation. This land contains many sacred sites and cultural places that are essential to the Onondaga way of life; and it contains tens of thousands of unmarked graves of the Onondaga ancestors.

18. The Onondaga people have maintained a distinct language for centuries. The contemporary Onondaga people are the descendants of the Onondagas who inhabited the territory for centuries before European explorations and incursions into their territories in the eighteenth and nineteenth centuries.

19. About one thousand years ago, the Onondaga Nation joined with the Mohawk, Oneida, Cayuga and Seneca Nations to form the Haudenosaunee Confederacy under the Gayanashagowa, or Great Law of Peace. The Tuscarora Nation joined in 1722. The Haudenosaunee is a legally-constituted confederation of sovereign Indian nations. The formation of the Haudenosaunee established peace among the member nations. It was formed on the shore of Onondaga Lake, in the heart of the Onondaga territory. Thus, Onondaga Lake is sacred to the Onondaga and the Haudenosaunee.

20. Treaties made on behalf of the Onondaga Nation, including the 1784 Treaty of Fort Stanwix, the 1789 Treaty of Fort Harmer, and the 1794 Treaty of Canandaigua, were made between the United States and the Haudenosaunee, also known as the Six Nations.

21. The aboriginal territory of the Onondaga Nation, as far as it lies within what is known as New York State, is an area or strip of land running generally north and south and lying between the aboriginal lands of the Oneida Nation on the east and the Cayuga Nation on the west. The Nation's aboriginal territory runs from the St. Lawrence River, along the west side of Lake Ontario and south, into Pennsylvania. The territory varies in width, but is generally around 40 miles wide. It comprises about 2.5 million acres.

## **VIII. Facts**

22. For centuries before the arrival of settlers from Europe into their territory, the Onondagas established villages throughout their homeland. They hunted, fished and gathered throughout the full extent of their territory. Prior to the Europeans' arrival, the Onondagas enjoyed a healthy diet of fish, wild game and corns, beans and squash from their gardens and fields.

23. In 1613, the Haudenosaunee made their first diplomatic treaty with a European government, when the Two Row Wampum agreement was reached with the Dutch, in a fort near what is now Albany, New York. This treaty established the diplomatic protocol for subsequent Haudenosaunee agreements with European powers who came into their territory; and it confirmed a peaceful relationship between the two sovereigns based upon mutual respect, commitments not



to interfere with the other's laws, culture or jurisdiction and a commitment to live in harmony with the natural world.

24. The European invasion of Onondaga lands disrupted Onondaga culture and society. Some of the earliest European colonists were hostile to the Onondaga Nation. For example, in 1615, French troops and their Algonquin allies, lead by Samuel D. Champlain, attacked the Onondaga village on Onondaga Lake. The French laid siege to the village and attempted to burn it. This attack and siege were eventually repelled. To a significant extent, the Nation and the other Haudenosaunee Nations were positioned between competing colonial powers, each focused on dominating the fur trade for their own economic advantage.

25. In the late 18<sup>th</sup> century, the United States initially sought to militarily subdue the Onondaga Nation, but failing that, eventually sought peaceful relations through treaties. In September of 1779, colonial troops, under direct orders of their commanding general, George Washington, attacked the Onondaga Village on Onondaga Creek, without warning, and burned it to the ground. These troops brutally murdered dozens of innocent Onondagas, including children, and raped Onondaga women. They destroyed Onondaga subsistence crops and food stores, forcing the few survivors to flee.

26. As a result of this 1779 burning of their village, most Onondagas were forced to move away from their homelands and sought the protection of the British at their fort near Buffalo, New York. This resulted in a prolonged period of removal from their homelands and its fracturing of their community; and New York State took advantage of these hardships of the Onondaga Nation, as it engaged in its successive takings of their lands, without their free, prior and informed consent, from 1788 to 1822.

#### **A. The Illegal Takings of Onondaga Lands**

27. The aboriginal territory of the Onondaga Nation is protected by three treaties with the United States that also established peace between the Haudenosaunee and the United States: the Treaty of Fort Stanwix of 1784, the Treaty of Fort Harmer of 1789, and the Treaty of Canandaigua of 1794. Article 3 of the Treaty of Fort Stanwix obligates the United States to secure the Haudenosaunee or Six Nations, and the Onondaga Nation as a member of the Haudenosaunee “in the peaceful possession of the lands they inhabit,” in exchange for their relinquishment of claims to lands in the Ohio Valley.<sup>13</sup> The Treaty of Fort Harmer affirms that obligation.<sup>14</sup>

28. In the Treaty of Canandaigua, the United States likewise acknowledged the lands of the member nations of the Haudenosaunee “to be their property,” and further agreed never to

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<sup>13</sup> 7 Stat. 15, Annex 1.

<sup>14</sup> 7 Stat. 33 (“renew[ing] and confirm[ing]” the Fort Stanwix Treaty), Annex 2.

“claim the same, nor disturb them or either of the Six Nations. . . in the free use and enjoyment thereof.”<sup>15</sup> The Treaty of Canandaigua has been enacted into federal law and remains in effect today.

29. The United States has enacted statutes consistent with, and designed to implement, its commitments in the Treaty of Fort Stanwix and Treaty of Canandaigua. In 1790, the United States Congress enacted a statute that regulated land transactions between Indian nations and others. The Trade and Intercourse Act (“TIA”) provided that such transactions are void unless they had been authorized and subsequently ratified by Congress in a valid and binding treaty. The statute is codified in federal law today at Title 25 United States Code § 177.<sup>16</sup>

30. The TIA embodies a federal policy committing the United States to protect Indian land by preventing “unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of the Congress, and to enable the Government . . . to vacate any disposition of their lands made without its consent.”<sup>17</sup>

31. The Onondaga Nation understood the Trade and Intercourse Act as a binding federal law and an explicit promise from the United States that the Nation’s lands would be protected against predation by the State of New York, its historic enemy in the region. In 1790, U.S. President George Washington explained the purpose of the Act to a delegation of the Haudenosaunee:

Here, then is the security for the remainder of your lands. No state, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but will protect you in all your just rights.<sup>18</sup>

32. President Washington anticipated that the State of New York would continue to seek to acquire Onondaga land in violation of the Act:

If however, you should have any just cause of complaint . . . the federal courts will be open to you for redress. . . .<sup>19</sup>

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<sup>15</sup> Article 2, 7 Stat. 44, Annex 3.

<sup>16</sup> Trade and Intercourse Act, 25 U.S.C. 177, Annex 4.

<sup>17</sup> *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 118 (1960).

<sup>18</sup> *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 238 n.8 (1985), Annex 5.

<sup>19</sup> *Id.*, Annex 5.

33. The Onondaga Nation has never conveyed, ceded, sold, given up or relinquished its title to any portion of its aboriginal territory. Consistent with its treaty commitments, the United States has never authorized or approved any transaction conveying Onondaga Nation land to any state, person, corporation, organization or other entity.

34. Today, despite these treaty and statutory guarantees, the Onondaga Nation is in possession of only a small fraction of its legally-protected territory. The land currently acknowledged as Onondaga territory under federal law comprises approximately 6,900 acres.

35. In a span of 34 years between 1788 and 1822, the State of New York, a political subdivision of the United States, seized control of the vast majority of the lands of the Onondaga Nation in a series of illegal transactions. None of these takings was authorized or approved by the Onondaga Nation itself.

36. Each of these takings violated the Treaties of Fort Stanwix and Canandaigua. None of them complied with the requirement of the TIA that only takings authorized and ratified by Congress could convey valid title.

37. As a result, under Onondaga law and federal law, including the treaties and the TIA, all of these transactions were void and could not pass valid and lawful title to the State of New York. The State nonetheless seized possession of this vast area and subsequently conveyed the land to its citizens in the intervening years, in violation of the obligations of the United States government.

38. By 1795, the traditional homeland of the Onondaga Nation had been reduced from approximately 2.5 million acres to 7,100 acres. Two subsequent takings in 1817 and 1822 further reduced the Onondaga territory to its present size of 6,900 acres.

39. The United States did not take action at the time to prevent these transactions nor did it subsequently provide a remedy to the Onondaga Nation for the loss of its land.

40. The history of the State takings shows a pattern of fraudulent, deceitful, and otherwise unlawful conduct on the part of the State of New York. The State negotiators deliberately misled the Indian participants in the discussions, in violation of the principle of free, prior and informed consent, and ignored the protests of the Onondaga Nation that those individuals had no authority to sell Onondaga Nation lands.

41. The largest New York State acquisition took place at Fort Schuyler on September 12, 1788, by which the State purported to purchase all of the Onondaga lands within the State's boundaries, except for a "reservation" of 100 square miles around Onondaga Lake. Approximately 2 million acres was lost under this taking. Before the discussions began, the

Onondagas notified the State officials that no chiefs with authority to speak for the Onondaga Nation would attend the meeting.<sup>20</sup>

42. Immediately upon learning of this so-called agreement, the Onondagas and the Haudenosaunee denied its validity, and pointed out that the negotiations were conducted with unauthorized individuals, at an improper location and without the knowledge or consent of the authorized Onondaga Chiefs.<sup>21</sup>

43. There is also evidence that the State of New York misled the Onondagas into believing that they were signing a lease of their lands in the 1788 transaction, rather than selling them outright.<sup>22</sup>

44. The Onondaga Nation and the Haudenosaunee also protested the validity of the 1788 land cession to the President of the United States.<sup>23</sup> Apparently in response to these protests, the State of New York attempted in 1790 to have the Onondagas “ratify” the 1788 taking, but the persons purporting to confirm the taking had no authority to do so under Onondaga law.

45. The New York State takings of 1788 and 1790 violated Onondaga and Haudenosaunee law, the Treaty of Fort Stanwix of 1784, the federal Articles of Confederation, the United States Constitution and the federal Trade and Intercourse Act. Although the taking was consummated before the Trade and Intercourse Act was enacted in 1790, this taking was never ratified or approved by the New York State Legislature nor recorded in the Secretary of State’s office, as required by New York law at the time. As a result, under its own law, New York never lawfully acquired these lands, even though it soon began to survey them and parcel them out to New York citizens. The protections of the Trade and Intercourse Act applied fully to those lands after 1790, and New York State’s treatment of them as its own property violated the Act because Congress had not authorized or ratified New York’s earlier taking.

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<sup>20</sup> Message from the Six Nations Council to New York Governor George Clinton, July 9, 1788, reprinted in F. Hough, ed., *Proceedings of the Commissioners*, at pages 166-167.

<sup>21</sup> Message from the Six Nations Council to New York Governor George Clinton, June 2, 1789, F. Hough, ed., *Proceedings of the Commissioners*, at pp. 331-332 (“what is partially purchased from Individuals, at improper Places, we are bound by the ancient Customs of our Forefathers to disapprove of.”).

<sup>22</sup> Speech of Black Cap to New York State Governor Clinton, September 10, 1788, reprinted in Franklin Hough, *Proceedings of the Commissioners of Indian Affairs*, p. 196.

<sup>23</sup> Letter to the President of the United States from the “Sachems, Chiefs, and Warriors of the Five Nations Assembled in Council,” at Buffalo Creek, June 2, 1788, Draper Collection, Series U, vol. 23, at pages 164-169 (“This [cession] we looked upon as Fraudulent means of possessing our Country, without paying the Value of any part thereof, for the good of the Nations in General to whom the lands belong.”).

46. In 1793, New York State purported to purchase about 230,000 acres of the land still retained by the Onondaga Nation. This transaction likewise was made with individuals who had no authority to negotiate with the State of New York about land cessions, a fact that the State negotiators knew. Again, the State deceived the Onondagas into thinking they were only leasing their lands. The New York State negotiator told the Onondagas that the State had “heard that your Nation [is] willing to lease” its lands, and further that “[w]e did not come to buy your land.”<sup>24</sup> In return for the loss of their land, the Onondagas received \$410 and were promised an annual annuity of the same amount.

47. The authorized leaders and chiefs of the Onondaga Nation, who did not participate in these discussions with the State, repudiated the 1793 transaction because it violated federal law and Onondaga law. The Onondagas complained to the United States that the individuals the New York Governor bargained with were “not properly entitled to dispose of the lands without our consent,” and that his dealing with them “without consulting the principal Chiefs, or proper owners . . . we consider him as one who wishes to defraud us of our Land . . . .”<sup>25</sup>

48. The Onondaga Nation repeatedly asked the State of New York to renegotiate the fraudulent takings of 1788-1793. At a meeting with federal officials immediately following the signing of the federal Treaty of Canandaigua, the Onondaga Chiefs explained the dire circumstances facing the Nation: “It is the situation of our lands which makes our minds uneasy. We have but two small pieces left and we are desirous of reaping from them all the benefits which they are capable of yielding. The [New] York people have got almost all of our Country and for a very trifle.”<sup>26</sup>

49. In 1795, the State of New York purported to purchase Onondaga Lake and a one mile strip around the Lake. This transaction likewise had not been authorized by the proper leaders and chiefs of the Onondaga Nation, and there is evidence that the State again misled the Nation in thinking the transaction was only a lease.

50. The State of New York made two final land transactions with the Onondagas in 1817 and 1822, by which it purported to purchase about 1,100 acres. The Onondagas and the Haudenosuantee protested to the United States that its failure to honor the treaties and protect their land against the aggressive land theft and acquisition campaign of New York State left the Nation practically landless. Chief Red Jacket, speaking on behalf of the Haudenosuantee, expressed the disappointment that the treaties and federal law were not upheld: “Your mind we suspect is a

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<sup>24</sup> Proceedings of the Negotiations Between the Onondaga Nation and Commissioners of the State of New York, New York State Archives, A-1823, Legislative Assembly Papers, vol. 40, folios 140-149.

<sup>25</sup> Onondaga Chief Clear Sky to U.S. Superintendent General Israel Chapin, New York State Archives, Legislative Assembly Papers, Vol. 40, pp. 83-87.

<sup>26</sup> Speech of the Onondagas & Cayugas addressed to U.S. Commissioner Timothy Pickering, November 16, 1794, Pickering Papers, 62: 104-105v.

good deal on War; Ours on saving our land. You are a cunning People without sincerity, and not to be trusted, for after making Professions of your Regard, . . . you then talk about a Road and tell us that our Country is within the lines of the States. This surprises us for we had thought our lands were our own, not within your Boundaries . . . .”<sup>27</sup>

51. For these purported sales of their land in 1817 and 1822, the Onondagas received from the State \$33,380 in cash, \$1,000 in clothing and an annuity of \$2,430 and 150 bushels of salt. The value received was unconscionably below the fair market value of lands sold in the non-Indian real estate market at the time. New York promptly sold the Onondagas’ land at five times the amount they had paid for it.

52. The Onondaga Nation understands that the 1794 Treaty of Canandaigua is still valid today, and continues to respect it and honor the commitments the Nation made therein. The U.S. government continues to send yearly annuity payments, in the form of cloth, as specified in the Treaty. Through this payment the U.S. government acknowledges that the Treaty is valid; and yet it has also created a judicial construct which denies any justice for violations of the Treaty.

**B. The Negative Consequences to the Onondaga People from the Illegal Takings of their Lands**

53. The loss of control over and access to their traditional hunting, gathering and fishing areas at the hands of the State of New York has deprived the Onondaga people of food and other materials essential to their health and welfare. As a result, the loss of their lands has degraded the health of the Onondaga people.

54. The loss of Onondaga original territory has also weakened and in some cases severed the Nation’s cultural and spiritual ties to Onondaga sacred sites, such as Onondaga Lake, the glacial, kettle lakes in the region of Tully, New York, and many others.

55. Further, tens of thousands of Onondaga ancestors are buried in unmarked graves throughout the Onondaga original territory and the loss of their homelands has severely hampered the Nation’s ability to protect and care for these ancestors’ graves. Their right to do so is acknowledged and protected by international law.<sup>28</sup> New York is only one of four states in the U.S. that has no law to protect unmarked graves.

56. The oral history of the Onondagas, as well as extensive archaeological evidence, documents that the Onondagas maintained seasonal and permanent villages throughout their entire territory, and that they hunted, fished and gathered widely. Another result of the illegal

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<sup>27</sup> Speech of the Senecas and others of the Six Nations at Niagara, September 21, 1796, O’Reilly Papers, vol. 15:41.

<sup>28</sup> See, e.g., United Nations Declaration on the Rights of Indigenous Peoples, Art. 12.

takings of their lands is that the place names for many of these former villages have been lost, along with other linguistic and cultural ties to these lands and waters.

### **C. Damage to Onondaga Lands from Extractive Industries**

57. The loss of Onondaga Nation lands has also meant that the Nation has been largely powerless to protect its lands against despoilisation by extractive industries.

#### *i. Chemical Pollution of Onondaga Lake*

58. As noted above, Onondaga Lake lies at the center of the homelands of the Nation, and it is sacred to the Nation. Prior to the arrival of Europeans in their territory, the Onondagas had villages on or near the Lake. Beginning in the late 1880s, the Lake was used as a dumping ground by several chemical-based industries, and in the process, has become one of the most polluted lakes in the entire United States. The Lake and its adjacent shore area contain multiple and separate toxic waste sites.

59. As a result of this century of industrial abuse and dumping, Onondaga Lake has been rendered severely damaged for the Nation and its peoples. Mercury was dumped in the Lake by a chemical manufacturing corporation, Allied Chemical, every day from 1946 to 1970, and now mercury is the major pollutant in the lake bottom sediment, where it is found from a few centimeters deep to depths of 60 feet. There are also 26 other toxic chemicals in the lake bottom sediment, which is one of the several toxic waste sites around the Lake.

60. Other waste sites from chemical plants near the Lake remain largely unremediated and continue to leak toxic chemicals into the ground and groundwater, and engineered solutions, such as steel barrier wells, pump and treat systems and engineered caps, only serve to temporarily contain some of the toxins, but will not remove the problems. Damage continues to fish, birds, animals, reptiles, amphibians and other wildlife that depend on the Lake, which also affects the health and welfare of all children and all pregnant women.

61. The production of soda ash by Allied Chemical took salt from the Tully Valley and limestone from the Manlius open pit mine, both of which are located on Onondaga territory. The wastes produced by this process were at first dumped directly into Onondaga Lake, reducing its volume by 40%. Then, they were piled up on the shores of the Lake, filling in almost all of the wetlands that had surrounded the Lake, and in hundreds of acres of wastebeds on the shores of and in close proximity to the Lake, where they remain to this day.

62. Many of the original species of animals, fish, birds, reptiles, amphibians and plants that originally lived in and near the Lake have disappeared due to the combined loss of habitat and intense chemical pollution. The fish that have remained are not fit for human consumption. The Lake waters are not fit for swimming or drinking.

ii. *Salt Mining in Tully Valley*

63. The only water bodies within the Nation's currently recognized territory of 6,900 acres are Onondaga Creek and its tributaries. The Creek is no longer suitable for fishing or recreational use as it always was. Before salt mining began upstream, Onondaga Creek was a clean, free-flowing stream that supported a healthy trout fishery. Elders at Onondaga can still remember spear fishing for brook trout in the Creek just decades ago.

64. For more than a century, unregulated salt mining was carried out in the Tully Valley, upstream of the Onondaga territory and Onondaga Creek. As a result, each day 30 tons of sediment/silt are being deposited into the Creek by a phenomenon known as "mudboils." These mudboils are the result of increased artesian pressure in the aquifer that was penetrated by the salt mining and that feeds the mudboils. This salt mining has left a huge vacuum under the Tully Valley, which has resulted in massive land subsidence, large sink holes and very large surface rock fissures.

65. This sediment dumping in Onondaga Creek has destroyed the natural ecosystem of the Creek both outside and within the boundaries of the Onondaga recognized territory. The Onondaga people have been deprived of their cultural links to the Creek; and the fishing, trapping, gathering, swimming and other recreational uses are all gone.

66. The Tully Gravel Mine, operated by Hansen Aggregate Corporation, has also caused damage to Onondaga Creek. This is a large, open pit sand and gravel mining operation on the north facing slope of the terminal moraine, which also contains the headwaters of several streams that form the beginning of Onondaga Creek. On at least one occasion, this gravel mine has caused extensive damage to one of the streams and destroyed the habitat that supported a brook trout spawning area.

iii. *Channelization of Onondaga Creek*

67. After Onondaga Creek leaves the Nation's territory, it flows in a northerly direction approximately ten miles until it reaches and feeds into Onondaga Lake. All of this downstream run of the Creek has been subjected to severe engineering and straightened channelization. The primary reason for this severe alteration was to convey untreated sewage to the Lake, particularly during rain events. This major portion of the Creek is no longer a naturally flowing, living ecosystem, but has been essentially turned into a canal, confined in concrete and rock channels. This portion of the Creek is no longer available to the Onondaga people for their traditional subsistence and recreational uses.



iv. *Damage to the Other Tributaries of Onondaga Lake*

68. Each of the other tributaries to Onondaga Lake has been severely channelized, had its natural path significantly altered, and has been used to convey intense chemical pollution into the Lake.

69. Ninemile Creek begins as a clear trout stream as it leaves Otisco Lake, but was redirected and channelized in order to carry multiple chemicals, such as BTEX, dioxins/furans, heavy metals, polyaromatic hydrocarbons, and naphthalene from the chemical production area near Solvay, New York, into the Lake.

70. Ley Creek was heavily polluted by a former General Motors factory with PCBs and other chemicals and its course was altered to facilitate this conveyance of pollution.

71. Bloody Brook was heavily polluted by a former General Electric television tube factory which dumped huge amounts of cadmium into the creek, which carried them into the Lake.

v. *Hydraulic Fracturing*

72. The southern two thirds of the original Nation territory sits on top of two Devonian shale formations: the Marcellus shale and the Utica shale. Thousands of individual, non-indigenous landowners in this territory have signed gas leases with several companies and these companies have promised to drill tens of thousands of high volume, slick-water horizontal gas wells using the extraction technique know as hydraulic fracturing, or “fracking.”

73. The Nation has expended countless hours and resources in the past six years working cooperatively with its non-indigenous neighbors to keep the State of New York from permitting fracking; and the Nation has resisted the proposed expansion of fossil fuel infrastructure, such as more pipelines in its territory and the storage of massive quantities of propane and other fossil fuels near its sacred lakes.

74. The Onondaga Nation is adamantly opposed to such extreme extraction practices for a variety of reasons: (a) the negative impact on climate change from all the leaked methane; (b) the destruction of billions of gallons of water used in the fracking that remains underground forever, thereby removing it from the world-wide water cycle; (c) the pollution of billions of gallons of fresh water from produced chemicals, heavy metals, and naturally occurring salt and radioactive materials in the shale; (d) severe air pollution; and (e) the destruction of wildlife and its habitat from large scale, industrial drilling pads and the multiple pipelines associated with them.

75. More specifically, the Nation’s drinking water system is threatened by fracking. All homes on the Nation’s currently recognized territory are connected to the Nation’s water system, built a decade ago solely with Nation funds. This is a spring fed drinking water system,

and the watersheds for these springs are located outside the territory. There are gas drilling leases in these watershed areas.

**D. Diplomatic Efforts to Seek Redress and Early Legal Barriers to Court Action**

76. The Onondaga Nation and its leaders have repeatedly attempted, without success, to have governments address and resolve their concerns about Onondaga land tenure, the illegal takings of their land and natural resource exploitations within its homelands. These efforts have been hampered by legal and historical doctrines such as "plenary power," by which the United States purports to exercise complete control over Indian nations, and the historical "Doctrine of Discovery," which posited that indigenous peoples lacked rights to their lands.

77. The United States federal courts have repeatedly held that "[t]he doctrine of discovery forms the basis for the well-established law of Indian land tenure."<sup>29</sup> The impact of the doctrine on Indigenous nations and their lands has been explained as follows: "Under the doctrine of discovery, the discovering European nation held fee title to Indian land, subject to the Indians' right of occupancy and use, sometimes called Indian title or aboriginal title."<sup>30</sup>

78. Using the doctrine of discovery, United States courts created a set of rules that declared that Indigenous nations were deprived of certain rights to their original lands immediately upon "discovery" by a Christian, European nation. Under these court rulings, the indigenous nations were left with only a right of occupancy that could be terminated by the United States government by purchase or conquest.<sup>31</sup>

79. Indian lands not protected by treaty are not considered "property" under the United States Constitution and may be taken by the federal government without due process or payment of compensation.<sup>32</sup> By contrast, Indian lands protected by treaty, such as those of the Onondaga Nation, are recognized as property the taking of which requires due process and just compensation pursuant to the United States Constitution.<sup>33</sup>

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<sup>29</sup> *Seneca Nation of Indians vs. New York*, 206 F. Supp. 2d 448, 503 (W.D.N.Y. 2002).

<sup>30</sup> *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 234 (1985), Annex 5.

<sup>31</sup> *Mitchel v. United States*, 34 U.S. 711 (1835).

<sup>32</sup> *Tee-Hit-Ton Indians v. US*, 348 U.S. 272, 283-85 (1955).

<sup>33</sup> *United States v. Creek Nation*, 295 U.S. 103, 109-11 (1935).

80. However, United States courts have held that the United States Congress has “plenary and exclusive authority” over Indians and their nations.<sup>34</sup> The Onondaga Nation has neither consented to nor authorized such authority. Under this plenary power doctrine, Congress claims the authority to impose federal policy directly on Indian nations without their consent; and United States courts have held that this plenary power can even be used to extinguish rights guaranteed by treaties.<sup>35</sup> Although this power “is not absolute”<sup>36</sup> and has been criticized as extraconstitutional<sup>37</sup> and inconsistent with international law,<sup>38</sup> the United States Supreme Court continues to affirm it.<sup>39</sup>

81. The Nation’s land rights action in federal court concerned lands protected by three federal treaties. Nonetheless, the “equitable” defense created by the courts to dismiss the action prevents the Nation from securing any remedy for the taking of these lands. This newly created defense discriminates against Indian nations and denies them access to the judicial system for remedies for violation of their fundamental rights to property

82. The Nation’s efforts to secure redress for the takings of its lands have been on-going since the initial takings of the land between 1788 and 1822. Onondaga protests about the taking of Nation land have been addressed to both the federal government of the United States and the State of New York as a political subdivision of the United States.

83. The historic, traditional method for resolving disputes between the Haudenosaunee nations and outside governments is negotiations between sovereigns. This principle of direct, diplomatic resolution of differences between sovereigns is reflected in Article VII of the 1794 Canandaigua Treaty, which endeavored to preserve “the firm peace and friendship now established . . . [between] the United States and the Six Nations” by providing for direct communications between the Nations and the President of the United States. The Onondaga Nation followed the treaty-mandated diplomatic approach to resolving disputes about the taking of its lands by the State of New York, but none of these efforts succeeded.

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<sup>34</sup> *United States v. Lara*, 541 U.S. 193, 200 (2004); *Washington v. Confederated Bands and Tribes of the Yakima Nation*, 439 U.S. 463, 470 (1979).

<sup>35</sup> *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99 (1960).

<sup>36</sup> *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 84 (1977).

<sup>37</sup> See, e.g., Sarah Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 1, 34 (2002).

<sup>38</sup> See, e.g., Philip P. Frickey, *Domesticating Federal Indian Law*, 81 Minn. L. Rev. 31 (1996).

<sup>39</sup> See, e.g., *United States v. Lara*, 541 U.S. 193 (2004).

84. On June 2, 1789, the Haudenosaunee Chiefs sent a message to President George Washington to protest New York State's taking of land in the 1788 transaction. The Chiefs denied its validity for the reason that the Onondagas who signed the agreement were "Young men and wrong headed people" with no authority to cede land, and that the Onondagas, therefore, looked upon this "as Fraudulent means of possessing our Country. . . ." <sup>40</sup>

85. On April 21, 1794, Onondaga Chief Clear Sky complained to U.S. Secretary of War Henry Knox about fraudulent land purchases and bemoaned the lack of effort by the U.S. Congress to provide a remedy for Onondaga land that had been lost: "We have borne every thing patiently for this long time past; we have done every thing we could consistently do with the welfare of our nations in general—notwithstanding the many advantages that have been taken of us, by individuals making purchases from us, the Six Nations, whose fraudulent conduct towards us Congress never had taken notice of, nor in any wise seen us rectified, nor made our minds easy." <sup>41</sup>

86. In 1802, a delegation of Haudenosaunee chiefs, including Onondaga chiefs, met with Secretary of War Henry Dearborn to discuss the United States' obligation to provide redress for violations of Haudenosaunee and Onondaga land rights. The meeting resulted in a presidential executive order affirming that the lands of the Onondagas "shall be and remain the property of the . . . Onondaga Nation forever, unless they shall voluntarily relinquish or dispose of the same." The order also provided that "[a]ll persons, Citizens of the United States, are hereby strictly forbidden to disturb said Indian nations in their quiet possession of said land." <sup>42</sup> The explicit promise contained in the order that the United States would protect the Onondaga Nation against further loss of its lands proved to be illusory.

87. The Haudenosaunee and Onondaga Nation frequently called on Congress and the President to investigate New York State's fraudulent and unlawful land transactions and to provide an adequate remedy for the hundreds of thousands of acres that were lost. None of these efforts succeeded. For example, in 1929 and 1930, the Onondagas, along with others of the Haudenosaunee, submitted petitions to Congress that asserted claims against the State of New York for illegal taking of their lands, noting that "every foot of land bought from the . . .

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<sup>40</sup> Letter to the President of the United States from the "Sachems, Chiefs and Warriors of the Five Nations Assembled in Council: at Buffalo Creek," June 2, 1789, Draper Collection, Series U, vol. 23, pp. 164-169.

<sup>41</sup> Proceedings of a Council at Buffalo Creek, in reply to message from Secretary of War Henry Knox, April 21, 1794, in *American State Papers*, I, 481.

<sup>42</sup> Confirmation of the Land Rights of the Senecas and Onondagas, March 17, 1802, National Archives, RG 75, Records of the Secretary of War, Indian Affairs, Letters Sent, vol. A, pp. 129-193.

Onondagas was illegally obtained in absolute contravention to the laws of Congress, to the United States Constitution and to the treaties.”<sup>43</sup> Congress took no action on the petitions.

88. Again in 1948, the Onondagas sought relief from Congress. During Congress’s consideration of bills to extend state jurisdiction over Indian reservations in New York, Onondaga Chief George Thomas objected to the bills on the ground they might impede assertion of land claims against the State. He characterized the Onondagas’ claims as “enormous, probably one of the biggest cases in the whole history of Indian relations, and we have been beating around the bushes so much . . . and we all point to this fact that we have this tremendous claim.”<sup>44</sup>

89. The Haudenosaunee and Onondaga Nation pursued all legal options that were available to seek redress for the taking of their lands. Historically, these efforts were severely hampered by legal doctrines in the United States that rendered federal and state courts closed to land claims by Indian nations. In 1929, a federal court ruled that federal courts did not have jurisdiction over claims by Indian nations that their land had been taken in violation of the Trade and Intercourse Act of 1790, because the case did not raise a “federal question.”<sup>45</sup> This ruling remained good law until 1974, when it was reversed by the U.S. Supreme Court in *Oneida Indian Nation v. County of Oneida*,<sup>46</sup> which held that the federal courts had jurisdiction to decide Indian nation claims under the Trade and Intercourse Act.

90. New York State courts likewise remained closed to Indian nations until very recently. Until 1987, under New York law, Indian nations were not acknowledged as having legal capacity to file lawsuits on their own.<sup>47</sup>

91. Further, New York courts required the appointment of attorneys by the State of New York for Indian nations as the exclusive means by which legal actions could be brought.<sup>48</sup> Throughout the period this rule was in effect, New York State exerted tight control over the selection and appointment of attorneys for the Onondaga Nation, refusing to empower the attorney to file legal actions and subjecting him to the specific direction of the state’s Governor. The Nation’s inability to file suit on its own behalf amounted to denial of its right to self-determination and to judicial protection. Because the State of New York would have been the

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<sup>43</sup> Statement of Minnie Kellog, Hearings on Senate Resolution 79, 79<sup>th</sup> Cong. 2d session, March 1, November 25-26, 1929, January 3, 1930.

<sup>44</sup> Hearings on S. 1683, 80<sup>th</sup> Congress, 2d session, 1948.

<sup>45</sup> *Deere v. State of New York*, 22 F.2d 851 (1927), *aff’d*, 32 F.2d 550 (2d Cir. 1929).

<sup>46</sup> 414 U.S. 661 (1974).

<sup>47</sup> *Oneida Indian Nation of New York v. Burr*, 522 N.Y.S. 2d 742 (1987).

<sup>48</sup> *Jackson ex dem Van Dyke v. Reynolds*, 14 Johns. 335 (1817).

principal defendant in any land rights action, the appointment power meant that no attorney was ever appointed to file actions to redress the loss of Onondaga land.

92. In 1974, when the U.S. Supreme Court ruled that the federal courts had jurisdiction to decide Indian nation claims under the Trade and Intercourse Act, the Onondaga Nation approached the President of the United States to discuss the possibility of a negotiated resolution of its land rights dispute. The Haudenosaunee met with a lawyer for the President in 1976 and 1982 to explore this possibility. The Onondaga Nation sent a letter to the President in 1989 making a similar request. None of these efforts was successful.

93. The Onondaga Nation also pursued negotiations with the State of New York directly to resolve its concerns regarding the loss of Nation land. On December 27, 1988, the Nation's Council of Chiefs wrote to New York Governor Mario Cuomo, seeking diplomatic discussions about the illegal land takings. This letter was the first step in a decade-long series of meetings among the Haudenosaunee and the Governor and state Attorney General.

94. Meetings with the State of New York included discussion of land and related issues such as state taxation of Haudenosaunee trade. From February of 1996 until May of 1997, the Nation and the other Haudenosaunee Nations met regularly, almost weekly, with the Governor's and State Attorney General's staff to resolve the long standing conflict between the State and the Nations over the State's repeated attempts to impose its excises taxes on stores within Haudenosaunee territories.

95. Although no agreement was reached on land rights, these intense diplomatic efforts resulted in a signed Trade and Commerce Agreement with the State of New York in May of 1997. Unfortunately, less than a month later, the Governor of the State of New York announced that he was unilaterally breaking this historic agreement.

96. Meetings about land rights continued, and in early 1998, a meeting was held that included the Nation, the State of New York, and the United States Department of Justice.

97. Diplomatic efforts to resolve Onondaga land rights issues were halted in mid-1998, when the Governor's staff informed the Nation that it must file its land rights action in federal court before settlement talks could proceed further.

#### **E. Judicial Procedures Invoked by the Onondaga Nation**

98. Having failed to secure any diplomatic resolution of the illegal takings of their lands from either the United States or the State of New York, the Nation filed suit in federal court to seek redress for the loss of its lands. However, the door opened by the United States Supreme Court in 1974 was closed soon after the Nation's filing.

99. The Nation asserted its case at all three available levels of the federal judicial system: U.S. District Court, the Court of Appeals and the U.S. Supreme Court. The Nation was denied relief at each stage. The federal courts uniformly ruled that they are powerless to provide any remedy. As a result, the loss of Nation lands at the hands of New York State cannot be redressed in the U.S. judicial system.

100. On March 11, 2005, the Nation filed a Complaint in the United States District Court for the Northern District of New York, seeking declarations that New York State's taking of Onondaga land violated the treaties and the Trade and Intercourse Act, and that the title to the land remained with the Nation. The action did not seek return of any land or any financial compensation.

101. The Onondaga Nation named as Defendants the State of New York; the Governor of New York; the County of Onondaga; the City of Syracuse; Honeywell International, Inc. (a successor to Allied Chemical); Trigen Syracuse Energy Corporation; Clark Concrete Company, Inc.; Valley Realty Development Company, Inc.; and Hansen Aggregates North America, Inc. The corporate defendants were selected because they had polluted Onondaga Lake and Onondaga Creek, and had destroyed the land by mining gravel at the head waters of Onondaga Creek and by operating a large open pit limestone mine within the Nation's territory.

102. The Complaint for Declaratory Judgment sought a court order that: 1) the purported conveyances of the "treaties" of 1788, 1790, 1793, 1795, 1817 and 1822 are void; and 2) the subject lands—the original lands of the Nation—remain the property of the Nation and the Haudenosaunee, and that the Nation and the Haudenosaunee continue to hold the title to these lands.

103. The Onondagas intended this legal action to bring about reconciliation between the Onondaga people and their neighbors, and to promote healing of the land that had been damaged as a result of Onondaga loss of title.

104. On March 29, 2005, less than a month after the filing of the Nation's Complaint, the United States Supreme Court ruled in *City of Sherrill v. Oneida Indian Nation*<sup>49</sup> that the doctrines of "laches, impossibility and acquiescence" precluded the Oneida Nation from asserting immunity from real property taxes on treaty-protected, reservation land that had been taken by the State of New York in 1795 but subsequently purchased by the Oneidas in the 1990s.

105. On July 26, 2005, the United States Court of Appeals for the Second Circuit applied the *Sherrill* ruling to an Indian land claim under the Trade and Intercourse Act. The Second Circuit Court reversed a \$248 million judgment in favor of the Cayuga Nation against the State of New York for its violations of the Trade and Intercourse Act in taking Cayuga land

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<sup>49</sup> 544 U.S. 197 (2005), Annex 7.

without congressional approval.<sup>50</sup> The court ruled Indian land claims that disrupt the “settled expectations” of the non-Indian landowners regarding the security of their land titles are subject to an entirely new equitable defense drawn from the doctrines of “laches, impossibility and acquiescence.” This defense applied, the court held, even though no landowners would be subject to the judgment, which was to be paid by the State of New York.

106. On August 1, 2005, the Nation filed an Amended Complaint<sup>51</sup> in its federal court action alleging the numerous and consistent actions it took from the time of the taking to assert its rights and to protest against New York’s confiscation of Nation lands. The Amended Complaint also explained the legal, political and economic obstacles that prevented the Nation from filing the lawsuit sooner.

107. On October 26, 2005, the Nation’s case was stayed, by agreement of the parties, until 60 days after the decision by the United States Supreme Court on the Cayuga Nation’s Petition for *Certiorari*, which sought review of the Second Circuit’s dismissal of Cayuga land claim, discussed above.

108. The U.S. Supreme Court subsequently refused to review the Second Circuit’s ruling in the *Cayuga* case.<sup>52</sup> As a result, the stay of the Onondaga’s lawsuit was lifted on July 5, 2006 by the District Court.

109. On August 15, 2006, all of the Defendants filed motions to dismiss the Onondagas’ Complaint on the ground that it failed to “state a claim” for relief under applicable federal law. The Defendants argued that the facts were irrelevant because it was impossible to grant any relief to the Onondagas that would not “disrupt” the non-Indian landowners, and that it was self-evident that the Onondagas had waited too long to bring the action. The motion was largely based on the U.S. Supreme Court’s decision in *Sherrill* and the Second Circuit’s decision in *Cayuga*. In their briefs, the Defendants did not deny any of the factual allegations in the Nation’s Amended Complaint.

110. On November 16, 2006, the Nation filed its Opposition to the Defendants’ Motion to Dismiss, which consisted of almost 1,000 pages of legal argument and evidence. The Nation’s evidentiary submission consisted of the following documents and exhibits:

- a. Declaration of historian Anthony F. C. Wallace, Ph.D. (efforts of Onondaga and Haudenosaunee to assert their land rights and protest loss of land).

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<sup>50</sup> *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005), Annex 8.

<sup>51</sup> *Onondaga Nation v. The State of New York*, Amended Complaint for Declaratory Judgment, August 1, 2005 (N.D.N.Y), Annex 5.

<sup>52</sup> *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006).



- b. Declaration of historian Professor Robert E. Beider, Ph.D. (same).
- c. Declaration of legal historian Professor Lindsay G. Robertson, Esq. (evidence that neither state nor federal courts were open to hear Onondaga land rights actions until 1974).
- d. Declaration of historian Professor J. David Lehman, Ph.D. (circumstances of New York State's taking of Onondaga land between 1788 and 1822 and efforts of Nation to call on United States for assistance with remedy).
- e. Declaration of Tadodaho Sidney Hill of the Onondaga Nation (legal, cultural, religious and political ties of Onondaga Nation to original territory of the Nation and land taken by New York State).
- f. Declaration of Joseph J. Heath, Esq. (efforts of Onondaga Nation today to reconcile with its neighbors and heal the land through this legal action).
- g. Declaration of Robert T. Coulter, Esq. (efforts of Onondaga Nation post-1974 to assert and resolve its land rights action against the State of New York).

111. On January 31, 2007, all of the Defendants filed a Reply to the Nation's Opposition to the Defendants' Motion to Dismiss.

112. Oral argument on the Defendants' Motion to Dismiss was heard by U.S. District Court Judge Kahn, in Albany, New York, on October 11, 2007. He reserved decision at that time.

113. On August 5, 2010, the Second Circuit Court of Appeals dismissed another Indian land claim based on violations of the Trade and Intercourse Act.<sup>53</sup>

114. On September 22, 2010, Judge Kahn issued a Memorandum Decision and Order that granted the Defendants' motions to dismiss and ordered the dismissal of the Nation's Complaint in its entirety, thereby foreclosing the possibility of any judicial relief for New York State's violations of the treaties and federal law.<sup>54</sup>

115. On October 20, 2010, the Nation filed its Notice of Appeal with the Second Circuit Court of Appeals.

116. On February 28, 2012, the Nation filed its Opening Brief in the Court of Appeals, arguing that the District Court decision was erroneous. By agreement of the parties, the filing of this brief had been delayed for more than a year, pending the decision by the U. S. Supreme Court

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<sup>53</sup> *Oneida Indian Nation v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010), Annex 9.

<sup>54</sup> *Onondaga Nation v. State of New York*, 2010 WL 3806492 (N.D.N.Y), Annex 10.

on the Oneida Nation's request for the Court to review the Court of Appeals dismissal of its Trade and Intercourse Act claim in 2010.

117. On March 23, 2012, an *Amicus Curiae* Brief was filed by law professors Matthew L.M. Fletcher, Kathryn E. Fort and Carrie E. Garrow. The brief argued that the *Sherrill* decision and the court of appeals decisions that applied it to Indian land rights actions were not grounded in principles of federal equity.

118. Briefing in the Nation's appeal was completed by June 8, 2012, and oral argument was held before a three-judge panel of the court in New York City on October 12, 2012.

119. One week later, on October 19, 2012, the Court of Appeals issued a two page Summary Order and Judgment affirming the District Court's dismissal of the Nation's complaint.<sup>55</sup>

120. On November 5, 2012, the Nation filed in the Court of Appeals a Petition for Rehearing, *en banc*, asking that all of the thirteen Circuit Judges rehear the appeal.

121. The Court of Appeals denied the Petition for Rehearing on December 21, 2012.

122. On April 30, 2013, the Nation filed a timely Petition for a Writ of *Certiorari* with the United States Supreme Court, seeking review of the Court of Appeals' decision dismissing the case.

123. On September 3, 2013, the Defendants filed their Brief in Opposition to the Writ of *Certiorari*.

124. On October 15, 2013, the Supreme Court issued an Order<sup>56</sup> denying the Nation's request for a Writ of *Certiorari*, refusing without explanation to review the case. The Onondaga Nation was notified of the decision the same day.

125. With this denial of review, there are no other possible judicial avenues for the Nation to pursue within the United States court system.

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<sup>55</sup> *Onondaga Nation v. The State of New York*, Summary Order, October 19, 2012 (2d Cir.), Annex 11.

<sup>56</sup> *Onondaga Nation v. New York*, Order Denying Petition for Writ of *Certiorari*, October 15, 2013 (U.S. Supreme Court), Annex 12.

## F. The United States Courts' Denial of Legal Remedies to the Onondaga Nation

126. The rulings 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. The United States courts' denial of legal remedies to the Onondaga Nation for the illegal taking of its lands was based on the discriminatory legal rule announced by the Second Circuit Court of Appeals in the Cayuga and Oneida Indian land claims cases. These decisions derived from the U.S. Supreme Court's decision in *City of Sherrill v. Oneida Indian Nation*.<sup>57</sup>

127. In *City of Sherrill*, the U.S. Supreme Court ruled that the Oneida Nation could not assert immunity from real property taxes the City sought to impose on lands it had purchased from non-Indians within its treaty-protected territory. Announcing and applying a new legal principle, the Court ruled that the Oneida claim was precluded by the "long lapse of time" during which the Oneidas failed to assert "sovereign control" over the purchased lands.<sup>58</sup> The court relied on ill-defined "equitable considerations," that "evoke[d]" the legal doctrines of laches, acquiescence and impossibility. Principally, the Court found the Oneidas' claim barred by "the passage of time."<sup>59</sup> However, the Court in *Sherrill* expressly preserved its holding in the 1974 *Oneida* ruling that Indian nations have the right to file suit in federal court for violations of their land rights under federal law.

128. Nonetheless, the lower federal courts soon extended the *City of Sherrill* equitable defense to Indian land claims under the Trade and Intercourse Act. In *Cayuga Indian Nation v. Pataki*,<sup>60</sup> the Second Circuit Court of Appeals overturned a \$248 million judgment awarded by the District Court to the Cayuga Nation against the State of New York for its taking of Cayuga land in violation of the Trade and Intercourse Act. The court applied the hybridized "equitable considerations" of *City of Sherrill*, even though that case did not concern land claims and even though a federal statute of limitations<sup>61</sup> protected Indian land claims from dismissal based on the passage of time. The court found that regardless of the nature of the remedy sought, the Cayugas' claim itself was inherently disruptive of the expectations of the non-Indian defendants.<sup>62</sup> This was found to be true even though no land ownership would be altered by the decision and only the State of New York would be liable for paying the judgment.

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<sup>57</sup> 544 U.S. 197 (2005), Annex 7.

<sup>58</sup> 544 U.S. at 216-217, Annex 7.

<sup>59</sup> 544 U.S. at 217, 221, Annex 7.

<sup>60</sup> 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006), Annex 8.

<sup>61</sup> 28 U.S.C. § 2415.

<sup>62</sup> 413 F.3d at 275, Annex 8.

129. The United States courts created this equitable defense specifically to deny a remedy to Indian nations for violations of their land rights. The defense is an unprecedented departure from established law. Three aspects of this Indian-specific defense set it apart from the equitable defenses applied to non-Indian claims. First, the application of an equitable defense to a claim for violation of a statute or treaty is anomalous.<sup>63</sup> Second, outside the Indian land rights context, courts applying a delay-based defense allow litigants to adduce at trial facts that preclude application of the defense. Such a factual inquiry includes whether the delay in filing suit was reasonable and whether the defendants were prejudiced by the passage of time in defending the lawsuit.<sup>64</sup> Third, courts do not typically apply equitable defenses to bar claims that are timely filed under the applicable statute of limitations.<sup>65</sup> The Second Circuit Court of Appeals implicitly acknowledged the aberrant nature of the newly-created equitable defense when it noted in the *Cayuga* case that “doctrines and categorizations applicable in other areas [of law] do not translate neatly to these [Indian] claims.” This new equitable defense has not been applied to the land rights claims of non-Indians.

130. The Second Circuit Court of Appeals further revealed the discriminatory effect of this new equitable defense in *Oneida Indian Nation of New York v. County of Oneida*.<sup>66</sup> In that case, the Oneidas sought to free their Trade and Intercourse Act land claims from the new equitable defense by proving that they had not unreasonably delayed in filing suit, so the equitable doctrine of laches did not apply, and by asserting a claim that was not predicated on a present-day right to possession of any land, so it was not in any way “disruptive” of the expectations of the defendants.

131. The Court of Appeals rejected both arguments. The equitable doctrine of laches, the court said, was nothing more than a “convenient shorthand” for broader equitable principles at stake. Unlike non-Indian laches cases, and because this case was an Indian land claim, the Oneidas were not given the opportunity to prove that laches did not apply, *i.e.*, that they had not unreasonably delayed and that the defendant landowners were not unduly prejudiced in their

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<sup>63</sup> *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 244 n.16 (1985) (“[A]pplication of the equitable defense of laches in an action at law would be novel indeed.”).

<sup>64</sup> See, e.g., *Ivani Contracting Corp. v. City of New York*, 103 F.3d 257 (2d Cir. 1997) (holding that laches may bar a plaintiff’s claim only where “he is guilty of unreasonable and inexcusable delay that has resulted in prejudice to the defendant”). As discussed below, the Nation submitted voluminous expert testimony to demonstrate the reasonableness of the delay and lack of prejudice to defendants. The court, however, declined to consider any such evidence.

<sup>65</sup> *Lyons Partnership, L.P. v. Morris Costumes, Inc.*, 243 F.3d 789, 798 (4<sup>th</sup> Cir. 2001) (the judicially created doctrine of laches should not be applied to bar a federal statutory claim that has been timely filed under an express statute of limitations).

<sup>66</sup> 617 F.3d 114 (2d Cir. 2010), Annex 9.

ability to defend against the Oneidas' claims.<sup>67</sup> Nor was the unfairness of depriving the Oneidas of any remedy considered by the court.

132. This new body of law “does not focus on the elements of traditional laches but rather more generally on the length of time between an historical injustice and the present day, on the disruptive nature of claims long delayed, and on the degree to which these claims upset justifiable expectations of individuals and entities far removed from the events giving rise to the plaintiffs' injury.”<sup>68</sup> The new rule barring Indian land claims holds that the more severe the violation against Indian rights, the more disruptive and therefore impermissible a suit for redress must be. In no other area of federal law is the right to a remedy inversely related to the effect of the claim on the defendants.

133. The federal courts applied this discriminatory body of law to deny a remedy to the Onondaga Nation for the taking of its lands by the State of New York between 1788 and 1822, and to refuse even to hear the merits of the Onondaga land rights action. Application of the *Sherrill*, *Cayuga* and *Oneida* decisions to the Onondagas' case results in unequal treatment under the law. As a result of these rulings, the legal guarantees afforded non-Indians are not available to protect the land of the Onondaga Nation. The federal courts dismissed the Nation's action without consideration of its merits, so that there was no inquiry into the question of whether the State of New York violated federal law when it took Onondaga land.<sup>69</sup>

134. Noting that the “legal ground on which [the Nation's] claims rest has undergone profound change since the Nation initiated its action,” the District Court concluded that the “law today forecloses this Court from permitting these claims to proceed.”<sup>70</sup> That law included the “laches-related defense” that “ancient land claims that are disruptive of justified societal interests” are barred, “regardless of the particular remedy sought.”<sup>71</sup> The court refused to consider the actions of the Onondagas to assert their case in the face of insurmountable obstacles related to capacity and jurisdiction. Rather, the court concluded that the “dispositive considerations” were “self-evident” because the long passage of time between the historical wrong and the filing of the case and the “disruptive nature” of the case were sufficient to bar it.<sup>72</sup>

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<sup>67</sup> 617 F.3d at 127, Annex 9.

<sup>68</sup> *Id.*, Annex 9.

<sup>69</sup> *Onondaga Nation v. State of New York*, 2010 WL 3806492 (N.D.N.Y. 2010), Annex 10.

<sup>70</sup> *Onondaga Nation v. State of New York*, 2010 WL 3806492 \*4 (N.D.N.Y. 2010), Annex 10.

<sup>71</sup> *Id.* at 7, Annex 10.

<sup>72</sup> *Id.* at 8, Annex 10.

135. The Court of Appeals traveled a similar path, confirming that the courts are closed to consideration of the merits of the Onondagas' land rights action. That court affirmed the dismissal on the ground that *Sherrill*, *Cayuga* and *Oneida* raise an "equitable bar" to "recovery of ancestral land."<sup>73</sup> The court also ignored the evidence that the Onondagas had persistently protested the illegal taking of their land, finding that the "standards of federal Indian law and federal equity practice stemming from *Sherrill* and its progeny would nonetheless bar relief."<sup>74</sup>

136. The "profound change" in federal law that now prevents the Onondaga Nation from seeking any remedy for the illegal taking of its lands has occurred simultaneously with the growing recognition in international law of the rights of indigenous peoples to their lands, to equal treatment, and to judicial protection.<sup>75</sup> As discussed below, the United States is obligated to secure and protect these rights.

## IX. Merits

137. The facts alleged above show that the United States is responsible for violations of the rights that are set forth in the American Declaration on the Rights and Duties of Man, the American Convention on Human Rights, and in other provisions of human rights law in regional and international instruments, including the United Nations Declaration on the Rights of Indigenous Peoples.

138. The Commission has held that the American Convention "may be considered to represent an authoritative expression of the fundamental principles set forth in the American Declaration."<sup>76</sup> In addition, the Commission has found that the Declaration must be interpreted and applied "in the context of the international and inter-American human rights systems more broadly, in the light of developments in the field of international human rights law since the Declaration was first composed and with due regard to other relevant rules of international law."<sup>77</sup>

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<sup>73</sup> *Onondaga Nation v. State of New York*, Summary Order, October 19, 2012 (2d Cir.), Annex 11.

<sup>74</sup> *Id.* at 4, Annex 11.

<sup>75</sup> *See, generally*, IACHR, Indigenous Lands Report.

<sup>76</sup> IACHR, Report No. 75/02, Case 11,140, Mary and Carrie Dann (United States), December 27, 2002, para. 97 ("Dann Report"), *citing* IACHR, Report of the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System, Doc. OEA/Ser.L/V/II.106, Doc. 40 rev. (February 28, 2000), para. 38; IACHR, Report No. 52/01, Case 12.243, Juan Raul Garza (United States), Annual Report of the IACHR 2000, paras. 88, 89 (confirming that while the Commission does not apply the American Convention in relation to member states that have yet to ratify that treaty, the Convention's provisions may inform the Commission's interpretation of the principles of the Declaration).

<sup>77</sup> Dann Report, para. 96.

139. “In particular,” the Commission has noted, “the organs of the inter-American system have previously held that developments in the corpus of international human rights law relevant to interpreting and applying the American Declaration may be drawn from the provisions of other prevailing international and regional human rights instruments.”<sup>78</sup>

**A. The Prohibition Imposed by the United States Legal System Against Provision of Remedies for Historic Violations of Indigenous Land Rights Violates the Human Rights of the Onondaga Nation**

140. In the case of Mary and Carrie Dann against the United States, the Commission held that:

“[Domestic legal processes in the United States] must . . . conform with the norms and principles under the American Declaration applicable to the determination of indigenous property rights as elucidated in this report. This requires in particular that the Danns be afforded resort to the courts for the protection of their property rights, in conditions of equality.”<sup>79</sup>

141. The 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.

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<sup>78</sup> IACHR Report No. 61/08, Case 12.435, Grand Chief Michael Mitchell (United States), July 25, 2008, para. 64 (*citing* I/A Court H.R., Advisory Opinion OC-10/89, Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, July 14, 1989, Ser. A No. 10 (1989), para. 37; I/A Court H.R., Advisory Opinion OC-16/99, The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Ser. A No. 16 (1999), para. 115; IACHR, Report No. 52/01, Case 12.243, Juan Raul Garza (United States), Annual Report of the IACHR 2000. *See also* I/A Court H. R., Case of Kichwa Indigenous People of Sarayaku v. Ecuador, Judgment of June 27, 2012, Series C No. 245 at para. 161 (“Sarayaku”) (discussing Inter American Court’s ability to interpret obligations imposed by treaties outside of the “same system of regional protection”).

<sup>79</sup> Dann Report, para. 146.

## **B. The Right to Property**

### Statement of Relevant Law

142. Article XXIII of the American Declaration provides that “[e]very person has the right to own such private property as meets the essential needs of decent living and helps maintain the dignity of the individual and of the home.”<sup>80</sup> Similarly, Article 21 of the American Convention provides that “[e]veryone has the right to the use and enjoyment of his property” and that “[n]o one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.”<sup>81</sup>

143. The organs of the Inter-American system have long recognized that Article XXIII of the American Declaration and Article 21 of the American Convention protect the collective rights of indigenous peoples to their communal property. In the seminal case of the Awas Tingni Mayagna (Sumo) Community against Nicaragua, the Inter-American Court of Human Rights examined the nature of indigenous property ownership and found that:

By virtue of their very existence, indigenous communities have the right to live freely on their own territories; the close relationship that the communities have with the land must be recognized and understood as a foundation for their cultures, spiritual life, cultural integrity and economic survival. For indigenous communities, the relationship with the land is not merely one of possession and production, but also a material and spiritual element that they should fully enjoy, as well as a means through which to preserve their cultural heritage and pass it on to future generations.”<sup>82</sup>

144. The Court held that “Article 21 of the Convention protects the right to property in the sense that it comprises, among other things, the rights of members of indigenous communities

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<sup>80</sup> The American Declaration of the Rights and Duties of Man, Article XXIII, Organization of American States (O.A.S.) Res. XXX (1948).

<sup>81</sup> The American Convention on Human Rights, Article 21(1), (2).

<sup>82</sup> I/A Court H. R., Case of the Awas Tingni Mayagna (Sumo) Community v. Nicaragua, Judgment of August 31, 2001, Series C No. 79, para. 149 (“Awas Tingni”). *See also* I/A Court H. R., Case of the Yakye Axa Indigenous Community v. Paraguay, Judgment of June 17, 2005, Series C No. 125, para. 131 (affirming the same) (“Yakye Axa”); I/A Court H. R., Case of the Sawhoyamaya Indigenous Community v. Paraguay, Judgment of March 29, 2006, Series C No. 146, para. 118 (same) (“Sawhoyamaya”); I/A Court H. R., Case of the Saramaka People v. Suriname, Judgment of November 28, 2007, Series C No. 172, para. 85 (same) (“Saramaka”); I/A Court H. R., Sarayaku, para. 145 (same).



within the framework of communal possession.”<sup>83</sup> Nicaragua’s failure to recognize and protect indigenous property rights in its domestic law violated Article 21.<sup>84</sup>

145. Similarly, in the case of the Xákmok Kásek Indigenous Community against Paraguay, the Court found that “[f]ailing to recognize the specific versions of the right to use and enjoyment of property that emanate from the culture, practices, customs and beliefs of each people would be equivalent to maintaining that there is only one way of using and enjoying property and this, in turn, would make the protection granted by Article 21 of the Convention meaningless for millions of individuals.”<sup>85</sup>

146. The Commission has applied this concept in the context of the American Declaration, following *Awas Tingni* to hold in the case of *Maya against Belize* that Article XXIII protects indigenous peoples’ property rights even where domestic legal regimes have failed to recognize such rights.<sup>86</sup> And in the case of *Mary and Carrie Dann against the United States*, the Commission found that simply providing a judicial process for adjudication of indigenous peoples’ property rights was insufficient where that process failed to incorporate any “judicial evaluation of pertinent evidence” regarding native property ownership<sup>87</sup> and failed to “take measures to address the substance” of indigenous peoples’ claims to title.<sup>88</sup>

147. The right of indigenous peoples to their communal property is further supported by the United Nations Declaration on the Rights of Indigenous Peoples, which has been adopted by

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<sup>83</sup> I/A Court H. R., *Awas Tingni* at para. 148.

<sup>84</sup> *Id.* at para. 153.

<sup>85</sup> I/A Court H. R., *Case of the Xákmok Kásek Indigenous Community v. Paraguay*, Judgment of August 24, 2010, Series C No. 214, para. 87 (“Xákmok Kásek”). *See also* I/A Court H. R. *Sarayaku* at para. 145 (affirming same); Draft American Declaration on the Rights of Indigenous Peoples, article XVIII(1), “Indigenous peoples have the right to live in harmony with nature and to a healthy, safe, and sustainable environment, essential conditions for the full enjoyment of the right to life, to their spirituality, world view and to collective well-being.” Approved by the Working Group to Prepare the Draft Declaration on the Rights of Indigenous Peoples on April 16, 2008 during the Eleventh Meeting of Negotiations in the Quest for Points of Consensus, *as reported in* Classification of Provisions that could Facilitate Consensus, OEA/Ser.K/XVI, GT/DADIN/doc.329/08 rev 6, 15 February 2013.

<sup>86</sup> IACHR, Report No. 40/04, Case 12,053, *Maya Indigenous Communities of Toledo District v. Belize*, October 12, 2004, para. 131 (“Maya Report”).

<sup>87</sup> *Dann Report* at para. 136.

<sup>88</sup> *Id.* at para. 140.

every member state of the Organization of American States, including the United States.<sup>89</sup> Article 37 of the U.N. Declaration provides as follows:

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

148. Further, Article 25 of the U.N. Declaration provides that “Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.” In addition, Article 29 provides that “Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.”

149. The right to property is also protected by the International Covenant on Civil and Political Rights, a binding treaty to which the United States is a party.<sup>90</sup> The Commission has found the ICCPR to be a part of “the general international legal principles applicable in the context of indigenous human rights” to the responsibilities of the United States.<sup>91</sup>

#### Statement of the Violation

150. Taking into account the interpretation by the organs of the Inter-American system of the guarantees provided in the American Declaration on the Rights and Duties of Man, and interpreting those guarantees “in the context of the evolving rules and principles of human rights law in the Americas and in the international community more broadly, as reflected in treaties, custom, and other sources of international law,”<sup>92</sup> the Onondaga Nation has alleged a violation of the right protected by Article XXIII of the American Declaration. The federal courts have refused to consider the merits of the Nation’s contention that federal treaties and statutes protect its title to its lands. The Nation’s historical, spiritual, and cultural relationship with its lands has been

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<sup>89</sup> See United Nations Declaration on the Rights of Indigenous Peoples, adopted by the U.N. General Assembly by Resolution A/61/295, 61<sup>st</sup> period of session (Sept. 13, 2007); Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples, United States Department of State, released Dec. 9, 2010, available at [www.state.gov/documents/organization/1804099.pdf](http://www.state.gov/documents/organization/1804099.pdf).

<sup>90</sup> International Covenant on Civil and Political Rights, Art. 27. See HRC General Comment No. 23 (1994): Article 27, U.N. Doc. CCPR/C/21?rev.1/Add.5(1994), at par. 7. (finding direct connection for indigenous peoples between the right to culture preserved by the ICCPR and the right to communal use and occupancy of traditional lands). See also I/A Court H. R., Sarayaku at para. 171 (discussing the right to culture guaranteed to indigenous peoples by international law and interpretation of that right in the Inter-American system).

<sup>91</sup> Dann Report at para. 129.

<sup>92</sup> Dann Report at para. 124.

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. The prohibition against provision of remedies for the loss of land is, in practical and legal effect, a denial of the right under which such land is held. A property right without any corresponding remedy for its violation is not a meaningful property right.

### **C. The Right to Equality**

#### Statement of Relevant Law

151. The right to equality and nondiscrimination is fundamental and is well-established in the Inter-American System. Article II of the American Declaration on the Rights and Duties of Man 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.” Article 1(1) of the American Convention requires that state parties “undertake to respect and recognize the rights and freedoms recognized [t]herein . . . without any discrimination for reasons of race, . . . social origin, . . . or any other social condition.” Article 24 of the American Convention on Human Rights further holds that “[a]ll persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”

152. The Inter-American Court has declared that “[i]n the current stage of the evolution of international law, the basic principle of equality and non-discrimination has entered the sphere of *jus cogens*.”<sup>93</sup> The Court has held that “states have an obligation to combat discriminatory practices”<sup>94</sup> and the Commission has found that “the notion of equality before the law set forth in the [American] Declaration relates to the application of substantive rights and to the protection to be given to them in the case of acts by the State or others.”<sup>95</sup>

153. For more than a decade, the Court and the Commission have consistently interpreted the nondiscrimination guarantees provided in the American Declaration and the American Convention to apply collectively to indigenous peoples, as well as to indigenous individuals.<sup>96</sup>

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<sup>93</sup> See I/A Court. H. R., *Xákmok Kásek* at para. 268. See also *id.* at para. 269 (listing more than two dozen international instruments supporting this principle, including the O.A.S. and U.N. Charters).

<sup>94</sup> I/A Court H. R., *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03 of September 17, 2003, Series A. No. 18, para. 88.

<sup>95</sup> Dann Report at para. 143 (internal citations omitted).

<sup>96</sup> See I/A Court H. R., *Sarayaku* at para. 145 (holding that “[indigenous] notions of land ownership and possession do not necessarily conform to the classic concept of property, but deserve equal protection under Article 21 of the American Convention”); I/A Court H. R. *Xákmok Kásek* at para. 87 (same); Dann Report at 128. See also IACHR, *Indigenous Lands Report* at paras. 62-67.

154. In the Dann case, the Commission found that Article II of the Declaration, “while not prohibiting all distinctions in treatment in the enjoyment of protected rights and freedoms, requires at base that any permissible distinctions be based upon objective and reasonable justification, that they further a legitimate objective, regard being had to the principles which normally prevail in democratic societies, and that the means are reasonable and proportionate to the end sought.”<sup>97</sup> In that case, the indigenous petitioners alleged and the Commission found that the legal guarantees accorded to non-indigenous property differed significantly from those accorded to indigenous property. Because the evidence failed to show any proper justification for these significant differences, the Commission found that Petitioners “ha[d] not been afforded equal treatment under the law respecting the determination of their property interests in [their] ancestral lands, contrary to Article II of the Declaration.”<sup>98</sup>

155. In a subsequent report in the case of the Maya Communities against Belize, the Commission found that mere existence of facially equitable laws can, in certain circumstances, be insufficient to uphold a state’s obligation in this regard:

As with all fundamental rights and freedoms, however, it is not sufficient for states to provide for equal protection in its law. States must also take the legislative, policy or other measures necessary to ensure the effective enjoyment of these rights.<sup>99</sup>

156. The right to equality and nondiscrimination is enshrined in other binding human rights instruments to which the United States is a party, including the International Covenant on Civil and Political Rights, which specifically provides in Article 14 that “[a]ll persons shall be equal before the courts and tribunals.” Article 5(a) of the Convention on the Elimination of Racial Discrimination, to which the United States is also a party, specifically protects “the right to equal treatment before the tribunals and all other organs administering justice,” and Article 6 provides that “State parties shall ensure to everyone within their jurisdiction effective protection and remedies, through the competent state tribunals” for violations of human rights protected by the Convention.<sup>100</sup>

157. The U.N. Declaration further supports the particular right of indigenous peoples to equal treatment. Recently, the Commission clarified that the rights to equality and

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<sup>97</sup> Dann Report at para. 143, *citing* Ferrer-Mazorra, et al., v. United States, Case 9903, Annual Report of the IACHR, 2000, para. 238.

<sup>98</sup> Dann Report at para. 145.

<sup>99</sup> Maya Report at para. 162. *See also* I/A Court H. R. Saramaka at para. 103 (rejecting State’s argument that legislation specifically preserving indigenous land rights would be discriminatory and citing cases holding that special measures to preserve such rights can be required). *See also* IACHR, Indigenous Lands Report at para. 53.

<sup>100</sup> Convention on the Elimination of All Forms of Racial Discrimination, Art. 6.

nondiscrimination “acquire additional specific content in the case of indigenous peoples” by virtue of the terms of the UN Declaration.<sup>101</sup>

#### Statement of the Violation

158. As discussed above, the federal courts have created and applied to the Onondaga Nation a new rule that deems indigenous actions to enforce property rights preserved by federal treaties and federal law inherently and impermissibly “disruptive.” The new rule prohibits judicial consideration of such actions regardless of the remedy sought.<sup>102</sup>

159. The prohibition created by the federal courts and applied to the Onondaga Nation is specifically limited to indigenous peoples and applies to no other category of claimant.<sup>103</sup> No other claimant is denied the opportunity to prove that its delay in filing suit was reasonable and justified under the circumstances. No other case is judged according to the speculative effect that the case itself might have on the defendants, regardless of the remedy that is sought. Because this rule is created and applied only to indigenous peoples, it violates the right to equal treatment guaranteed by the American Declaration and supported overwhelmingly by international law and the international community. United States courts have offered no justification or reason for the different treatment accorded indigenous claimants. There is no such justification.

#### **D. The Right to Judicial Protection and Due Process**

##### Statement of Relevant Law

160. Article XVIII of the American Declaration provides that “[e]very person may resort to the courts to ensure respect of 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.” Similarly, Article 25 of the American Convention holds that “[e]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention.” Article 8(1) explicates the procedural aspects of this right to judicial protection, providing that “[e]very person has the right to a hearing” by a competent tribunal to determine his rights.

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<sup>101</sup> IACHR Report No. 125/12, Case No. 12.354, Kuna of the Madungandí and the Emberá of Bayano (Panama), Nov. 13, 2012, para. 289 (citing U.N. Decl. Arts. 2 & 9) (“Kuna Report”).

<sup>102</sup> See, e.g., *Onondaga Nation v. State of New York*, Summary Order and Judgment, October 19, 2012 (2d Cir.), Annex 11; *Oneida Indian Nation v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010), Annex 9.; *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005), Annex 8.

<sup>103</sup> See discussion, section VIII(F), above.

161. The Inter-American Commission and the Inter-American Court have interpreted the right to judicial protection to apply in a wide range of circumstances to indigenous peoples' efforts to protect their right to property and to obtain redress for takings of that property.

162. The Court expressed the fundamental nature of this right in the *Awas Tingni* case, finding that:

“The Court has . . . reiterated that the right of every person to simple and rapid remedy or to any other effective remedy before the competent judges or courts, to protect them against acts which violate their fundamental rights, ‘is one of the basic mainstays, not only of the American Convention, but also of the Rule of Law in a democratic society, in the sense set forth in the Convention.’”<sup>104</sup>

163. Further, the Court has held that “the obligation of the State to provide a judicial remedy is not satisfied by the mere existence of courts or formal procedures or even the possibility of having recourse to the courts. Rather, the State has the duty to adopt affirmative measures to guarantee that the judicial remedies it provides are ‘truly effective in establishing whether or not a human rights violation has occurred and providing redress.’”<sup>105</sup>

164. Compliance with the American Convention and, by extension, the American Declaration, requires expeditious adjudication of the merits of claims of human rights violations and execution by the domestic tribunals of judgments regarding the same.<sup>106</sup> Furthermore, “with regard to indigenous peoples, it is essential that the States grant effective protection that takes into account the inherent particularities of indigenous peoples, their economic and social characteristics, and their special vulnerability, and their customary law, values, practices and customs.”<sup>107</sup>

165. Because domestic judicial procedures must yield “actual results,”<sup>108</sup> the Court has held that the American Convention requires States “to establish appropriate procedures in the framework of the domestic legal system to process the land claims of the indigenous peoples involved. The States must establish said procedures to resolve those claims in such a manner that

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<sup>104</sup> I/A Court H. R., *Awas Tingni* at para. 112 (internal citations omitted).

<sup>105</sup> I/A Court H. R., *Sarayaku* at para. 261 (internal citations omitted).

<sup>106</sup> *Id.* at para. 263.

<sup>107</sup> *Id.* at para. 264.

<sup>108</sup> I/A Court H. R., *Yakye Axa* at para. 100.

these peoples have a real opportunity to recover their lands.”<sup>109</sup> To redress violations of the right to judicial protection, the Court has ordered states to, *inter alia*, pass legislation, enact administrative procedures, and pay damages to indigenous communities.<sup>110</sup>

166. The Commission has interpreted the right to judicial protection pursuant to the American Declaration in the context of indigenous land rights.<sup>111</sup> In the Dann case, the Commission examined special procedures provided by the United States for indigenous peoples’ claims related to their lands. Those procedures, while intended to provide adjudication of claims, failed to fully protect the right to judicial protection by excluding from consideration the central question of whether Petitioners land rights had ever been lawfully extinguished.

167. Based on the evidence before it, the Commission found that “the issue of extinguishment was not litigated before or determined by [the special tribunal established for indigenous land rights claims], in that the [tribunal] did not conduct an independent review of historical and other evidence to determine as a matter of fact whether the Western Shoshone properly claimed title to some or all of their traditional lands.”<sup>112</sup> For this reason, the Commission found, “it cannot be said that the Dannels’ claims to property rights in the Western Shoshone ancestral lands were determined through an effective and fair process in compliance with the norms and principles under Articles XVIII and XXIII of the American Declaration.”<sup>113</sup>

168. Similarly, in the Belize case, the Commission examined the judicial process provided by the State for adjudication of Maya land rights and found it lacking. In that case, the Maya communities sought to confirm their title to their ancestral lands in the domestic courts. In the absence of such title, the State was granting logging and oil concessions on Maya lands to

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<sup>109</sup> *Id.* at para. 102.

<sup>110</sup> *See, e.g.*, I/A Court H. R., *Awas Tingni* (ordering the adoption by Nicaragua of legislative, administrative, or other mechanisms to effectively delimit, demarcate, and title indigenous lands, and to pay reparations to the Mayagna communities); I/A Court H. R., *Yakye Axa* (ordering the State to identify and convey to the Yakye Axa people their traditional territory, to adopt legislative, administrative or other mechanisms to effectuate the right to property; to pay reparations; and to establish a community development fund); I/A Court H. R., *Xákmok Kásek* (same). *See also generally* IAHCRC Indigenous Lands Report at paras. 48-52 (discussing specific obligations owed by states to indigenous peoples).

<sup>111</sup> *See, e.g.*, Dann Report, Maya Report.

<sup>112</sup> Dann Report at para. 142.

<sup>113</sup> Dann Report at para. 142. The Commission clarified that “it is not for [the Commission] in the circumstances of the present case to determine whether and to what extent the Dannels may properly claim a subsisting right to property in the Western Shoshone ancestral lands. This issue involves complex issues of law and fact that are more appropriately left to the State for determination through those legal processes it may consider suitable for that purpose. These processes must, however, conform with the norms and principles under the American Declaration, applicable to the determination of indigenous property rights as elucidated in this report.” *Id.* at para. 146.

third parties. Domestic courts, however, failed to provide any remedy to the Maya communities in part because the failure of the State to participate expeditiously in those processes prevented the courts from addressing the merits of the Maya claims.<sup>114</sup>

169. The Commission therefore found that Belize violated Maya rights to judicial protection guaranteed by Article XXVIII of the American Declaration “by rendering domestic judicial proceedings brought by them ineffective . . .” and thereby “failing to provide them with effective access to the courts for the protection of their fundamental rights.”<sup>115</sup>

170. As a part of its deliberations on the proposed American Declaration on the Rights of Indigenous Peoples, [the OAS] has adopted by consensus proposed Article XXIII, which provides that “Indigenous peoples and persons have the right to effective and appropriate remedies, including prompt judicial remedies, for the reparation of all violations of their collective and individual rights. The States, with full and effective participation of indigenous peoples, shall provide the necessary mechanisms for the exercise of this right.”<sup>116</sup>

171. The holdings of the organs of the Inter-American system are supported and strengthened by the terms of the United Nations Declaration on the Rights of Indigenous Peoples regarding access to courts and redress for violations of indigenous peoples’ rights. These provisions are responsive to the long history of widespread violations of indigenous land rights and the present threat to such rights.

172. Article 40 of the U.N. Declaration provides that “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.” The U.N. Declaration’s Article 28 further provides that “Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands . . . which they have traditionally owned or otherwise occupied or used . . .” And Article 32 of the U.N. Declaration provides that “[s]tates shall provide effective mechanisms for just and fair redress for any [project or development activity affecting indigenous lands], and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.”

173. Further, the U.N. Committee on the Elimination of Racial Discrimination has determined that the International Convention on the Elimination of All Forms of Racial

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<sup>114</sup> Maya Report at paras. 178-186.

<sup>115</sup> Maya Report at para. 186.

<sup>116</sup> Approved by the Working Group to Prepare the Draft Declaration on the Rights of Indigenous Peoples on April 16, 2008, during the Eleventh Meeting of Negotiations in the Quest for Points of Consensus, *as reported in* Classification of Provisions that could Facilitate Consensus, OEA/Ser.K/XVI, GT/DADIN/doc.329/08 rev 6, 15 February 2013.



Discrimination (CERD), a binding treaty to which the United States is a party, protects the right to redress in the courts for indigenous peoples claiming violations of their land rights.<sup>117</sup> Article 6 of CERD provides that “state parties shall assure to everyone in their jurisdiction effective protection and remedies.”

174. In reviewing the case of Mary and Carrie Dann against the United States, CERD reiterated the Commission’s finding that the process by which Western Shoshone land rights were deemed to be extinguished did not “comply with contemporary international human rights norms, principles and standards that govern the determination of indigenous property interests.”<sup>118</sup>

175. Similarly, the International Covenant on Civil and Political Rights, to which the United States is a party, protects the right to redress for human rights violations, including violations of the rights of indigenous peoples to their lands preserved by Article 27 of that Covenant, as discussed above.<sup>119</sup>

#### Statement of the Violation

176. As described above, the Onondaga Nation has long sought redress for the illegal takings of its lands. Nation efforts have included diplomacy with the State of New York and the United States, and, following the failure of those efforts, the filing of a legal action in the federal courts.

177. The Nation’s domestic legal action was based on treaties that are enacted into federal law and that the federal courts have upheld as valid. The United States Constitution mandates that treaties are “the supreme law of the land.”<sup>120</sup>

178. The Nation’s case rested further on the federal statute that prevents takings of Indian lands absent consent of Congress. Congress did not consent to the takings of Onondaga Nation lands. The land rights action was filed within the time period required by federal statute and was supported by nearly 1,000 pages of documentary evidence. Finally, the Nation’s court claim for relief was limited to a declaration of the violations of treaties and federal law and of the Nation’s rights to its lands. The court action did not seek return of any land or any financial compensation.

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<sup>117</sup> CERD Early Warning and Urgent Action Decision 1(68).

<sup>118</sup> CERD Early Warning and Urgent Action Decision 1(68).

<sup>119</sup> See ICCPR Article 27; Article 2(3)(a) (protecting the right to “an effective remedy”); Article 2(3)(b) (requiring states “[t]o ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities”).

<sup>120</sup> U.S. Const. art. 6, cl. 2.

179. Nonetheless, the federal courts refused to consider the merits of the Onondaga Nation's case, holding that indigenous peoples' claims for relief arising from violations of their land rights are "inherently disruptive" no matter what remedy is requested, and therefore cannot be considered. This holding, created in earlier cases and applied to other indigenous peoples' claims for such assorted relief as declaratory judgment, money damages, fair compensation for inequitable contracts, and claims for title, bars indigenous peoples from any adjudication of their rights to lands, territories and resources.

180. By creating and applying such a ruling, the federal courts of the United States have violated the right of the Onondaga Nation and its citizens to judicial protection, confirmed by the American Declaration as interpreted in the context of the "general international legal principles"<sup>121</sup> discussed above. As a part of its obligation to insure judicial protection for the Nation, the United States must provide a judicial or other forum for adjudication of the Nation's rights.

181. Violation of the right of judicial protection is particularly egregious given the fundamental nature of the right to land and the special relationship of indigenous peoples to their lands, as well as the fact that the rule created by the courts to prevent adjudication of the Nation's rights to its lands applies only to indigenous peoples and to no other group. Because the federal courts applied a discriminatory legal rule preventing the Onondaga Nation from obtaining any remedy for the illegal taking of their lands, the United States has failed to uphold its obligation of judicial protection under the American Declaration on the Rights and Duties of Man.

## **X. Request for Relief**

182. For the foregoing reasons, the Onondaga Nation respectfully requests that the Commission prepare a report setting forth all the facts and applicable law, declaring that the United States is responsible for violations of rights affirmed in the American Declaration of the Rights and Duties of Man and recommending that the United States:

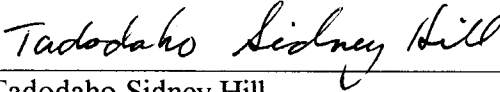
- A. Reach agreement with the Onondaga Nation, through discussion with the Nation's leaders and the Nation's chosen representatives, on mechanisms by which the United States can fulfill its treaty obligations to the Nation and remedy the violations of the Nation's rights declared by the Commission. Such mechanisms should include, subject to agreement by the Nation:
  1. Reversal of the "equitable" rule that bars the federal courts from hearing the merits of the Onondaga Nation's land rights action

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<sup>121</sup> Dann Report at para. 130.

2. Establishment of an independent commission to study the violation of treaties between the United States and Indian nations and the subsequent disruption of Indian cultures, economies and governments by the United States and its political subdivisions
  3. Adoption of any legislative, administrative or other mechanisms to ensure the protection of the Nation's rights, including its natural and inherent rights, and to promote the Nation's goal to live in balance with its neighbors and the natural world
  4. Submission of written reports to the Commission every six (6) months to document the progress towards remediation of the violations.
- B. Implement the mechanisms agreed upon by the United States and the Onondaga Nation to remedy these violations according to the requirements of the American Declaration of the Rights and Duties of Man, the United Nations Declaration on the Rights and Duties of Man, and other instruments of international law.

Signed this 14<sup>th</sup> day of April, 2014.

  
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Tadodaho Sidney Hill,  
Onondaga Nation