

Panama is in Breach of its Obligations to Indigenous Peoples under the Convention on the Elimination of All Forms of Racial Discrimination

A shadow report respectfully submitted to the

United Nations Committee on the Elimination of Racial Discrimination

On the occasion of its consideration of the 15th to 20th Periodic Reports of Panama

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I. Introduction & Summary

A. Purpose and Background of this Shadow Report

Alianza para la Conservación y el Desarrollo (ACD) is a Panamanian, non-profit non-governmental organization based in Panama City. ACD's mission is to "Promote conservation and alternative development through the defense and empowerment of Panamanian Society to make it more just and environmentally responsible." ACD works with several indigenous, Afro-descendant, and peasant groups throughout Panama, assisting these groups with community development and environmental justice work. At times, ACD also assists indigenous groups and other vulnerable populations in Panama in bringing complaints before international bodies, such as the Inter-American Commission on Human Rights.

Recently ACD has become involved with several indigenous groups who are uniquely threatened by a number of development projects in Panama. ACD strongly believes that these projects are being undertaken in such a manner as to violate the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter ICERD, or the Convention),¹ along with other international laws and norms protecting indigenous populations.

ACD is pleased that Panama has recently submitted a consolidated Periodic Report to the Committee on the Elimination of Racial Discrimination (hereinafter CERD, or the Committee) as required under the Convention. However, after reviewing the Periodic Report, ACD is concerned that it is incomplete, particularly in that Panama's Periodic Report mainly recites laws and constitutional protections but does not engage in an analysis of implementation or actual occurrences in the lives of indigenous peoples. Furthermore, Panama's Periodic Report was written without the participation or input of civil society.

This shadow report therefore aims to supplement Panama's Periodic Report regarding compliance measures through three illustrative examples of indigenous communities affected by development projects, particularly in the Province of Bocas del Toro in Western Panama. Thus, it specifically addresses Panama's compliance with the Convention as it concerns *indigenous* populations. In particular, this shadow report concludes that in Panama there is a pattern of discrimination against indigenous people that manifests itself in the inequitable and even violent treatment of indigenous peoples for the purpose of accessing and exploiting their lands, even while indigenous rights to these lands are protected under international law.

ACD sincerely appreciates the Committee's efforts to review this shadow report and hopes that the shadow report will assist the Committee in its evaluation.

¹ International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter ICERD] (entered into force Jan. 4, 1969).

B. The ICERD is Binding on Panama and Applies to Panama's Indigenous Populations

Panama is a signatory to the ICERD, which went into effect in 1969. Panama became a signatory in 1966 and ratified the ICERD in 1967 with no reservations.² ICERD is therefore binding on Panama.

Furthermore, the provisions of ICERD apply to indigenous peoples as racial or ethnic groups and discrimination against indigenous peoples is therefore contrary to the terms of the ICERD. Article 1 of the Convention defines "racial discrimination" as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms."³ In General Recommendation XXII: Indigenous Peoples, the CERD affirmed that discrimination against indigenous peoples falls within the scope of the Convention and, moreover, that "the situation of indigenous peoples has always been a matter of close attention and concern."⁴

C. Summary of Shadow Report

This shadow report focuses on three indigenous communities in order to illustrate a pattern of discrimination against indigenous peoples in Panama. First, several Ngöbe villages in the Bocas del Toro Province are threatened by the construction of a hydroelectric dam on territory where Ngöbe claims had never been extinguished and where they still live today. Second, the Naso of western Panama have been denied the recognition of a Comarca, or semi-autonomous territory, which Panama has granted to other indigenous groups. Due to this lack of protection for their territorial rights, the Naso communities of San San and San San Druy have been repeatedly invaded and destroyed by employees of a ranching company that claims legal title to a portion of their ancestral lands. Third, tourism developers in the Bocas del Toro Archipelago are taking advantage of a poorly thought out laws and corrupt local officials to cheat indigenous Ngöbe residents out of their property and force them into ghettos on the outskirts of the main tourist town. Despite requests from residents, the government has not made any attempt to fix the problem.

All three of these cases have resulted in threats and physical violence against indigenous individuals and communities, sometimes on the part of a private party and sometimes by State police forces that the government of Panama has sent to aid private companies. In all three areas, houses, crops, and other property have been destroyed by heavy machinery. Police have occupied the areas in order to protect "private property interests."

² United Nations Treaty Collections, Status of Treaties: International Convention on the Elimination of All Forms of Racial Discrimination (2009), available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en

³ ICERD at Part 1, Art. 1(1).

⁴ Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII: Indigenous Peoples*, ¶¶ 1, 2, U.N. Doc. CERD/C/51/misc 13/Rev 4 (Aug. 18, 1997) [hereinafter *CERD General Recommendation XXIII*].

Community members have lost their possessions and even been injured and hospitalized as a result of police violence. Many families have been displaced and their standard of living has decreased significantly.

This shadow report draws on international norms of indigenous rights to help define discrimination in the context of indigenous peoples and aid in the interpretation of the ICERD. In particular, this shadow report recognizes the importance of indigenous territorial rights in international law and links the historical non-recognition of these rights with historic discrimination against indigenous peoples, who were viewed as incapable of land ownership because of a lack of European-style institutions. The authors of this shadow report consider Panama's violations of the ICERD in light of this and other international norms protecting indigenous peoples specifically, including the requirement of free, prior and informed consent in the cases of relocation of indigenous communities and development of their natural resources.

Following from this analysis, Panama's failure to fully recognize and protect the indigenous territorial claims of the Ngöbe and Naso, or to follow requirements for real, meaningful consultation and consent constitutes a violation of the general prohibition against discrimination in Article 2 of the Convention as well as the specific protection of property rights in Article 5.

Additionally, the use of State police force to threaten and physically harm indigenous residents, eject them from their communities, and destroy their homes and other property in order to aid private companies in development projects violates requirements set forth in Articles 2 and 4 of the Convention that the state neither engage in discrimination nor sponsor or support discrimination by private entities. It further violates protections against violence and bodily harm contained in Article 5. The destruction and police occupation of indigenous communities also threatens several civil and cultural rights protected by Article 5, including rights to residence and housing, freedom of movement, freedom of religion and cultural expression, community health, and free association and assembly. Finally, Panama is in violation of protections for community health, welfare, and cultural integrity afforded by Articles 2 and 5 of the ICERD, as well as the spirit of the ICERD, because these indigenous communities are disproportionately and negatively affected by the environmental effects of development projects but will receive little or none of the benefit.

II. Report of Facts: The Situations in Three Indigenous Communities

As with other indigenous peoples, the history of land loss for Panama's indigenous peoples is directly linked with discrimination: "Early legislation regarding indigenous populations in Panama called for their conversion to civilized life. The means specified included the transfer of Indian lands to nonindigenous settlers and the promotion of state-sanctioned agriculture on former indigenous lands."⁵ Today, the transfer of indigenous land to non-indigenous parties continues. While Panama currently recognizes several

⁵ Stephanie Wickstrom, *The Politics of Development in Indigenous Panama*, 30 LATIN AMERICAN PERSPECTIVES 43, 45 (2003), available at <http://www.lap.sagepub.org>.

indigenous Comarcas, or semi-autonomous territories, in many cases this guarantees only usufruct rights while the state claims the right to govern the lands and exploit its resources.⁶ Furthermore, Panama does not recognize a Comarca for every indigenous nation within its borders, and not even usufruct rights are guaranteed to indigenous populations outside of Comarca boundaries. Today, many of Panama's indigenous peoples are negatively affected by these and other policies and actions undertaken in violation of the ICERD. This shadow report focuses on three separate indigenous communities to illustrate the widespread nature of these violations.

A. The Ngöbe of the Changuinola River Valley

While Panama does recognize a Ngöbe Comarca, this Comarca only encompasses about two thirds of the Ngöbe's population. Furthermore, the government of Panama claims the rights to develop all natural resources within the Comarca. Article 48 of Law 10 of 1997 reserves the State the right to decide on the use of natural resources within the Comarca, and the special provisions of the General Environmental Law that protected the rights of indigenous peoples to informed consent - articles 63, 96, 98, 101 and 102 of Law 41 of 1998 - were eliminated by the National Assembly without prior consultation through Law 18 of 2003.⁷ Outside of the Comarca boundaries, the Ngöbe are vulnerable to fraud and coercion dispossessing them of their lands because they receive no special protections. Furthermore, they are subjected to devastating effects of development projects pursued without their free, prior informed consent or respect for their indigenous rights and ways of life. Although Law 10 of 1997 provided a special mechanism for the protection of lands outside of the Comarca through the creation of annex areas, this legislation has never been implemented in spite of having financing from the World Bank Land Administration Program (PRONAT).

For example, many Ngöbe are settled within what is now the Bosque Protector de Palo Seco (BPPS), a protected forest according to Panamanian legislation. When BPPS was created in 1983, not only was it created from territory where indigenous claims had never been extinguished, but there were actually settlements in the area.⁸ Despite these facts, indigenous groups in the area were not consulted upon the creation of the protected

⁶ *Id.* at 45.

⁷ On December 6, 2000, The Supreme Court ordered the temporary suspensión of the Environmental Impact Assessment Resolution that approved the construction of the Tabasara II hydroelectric project based on the violation of articles 63, 99 and 102 of the General Environmental Law (Law 41 of 1998) that "guardan relación con la participación y aquiescencia que es preciso obtener de las comunidades indígenas".

⁸ SPECIAL RAPPORTEUR ON THE SITUATION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS OF INDIGENOUS PEOPLE, S. JAMES ANAYA, OBSERVACIONES SOBRE LA SITUACIÓN DE LA COMUNIDAD CHARCO LA PAVA Y OTRAS COMUNIDADES AFECTADAS POR EL PROYECTO HIDROELÉCTRICO CHAN 75 (PANAMÁ), (May 12, 2009) (hereinafter *Observaciones sobre la situación de la Comunidad*), ¶ 49 (translated by shadow report author).

territory.⁹ Now, they are unable to claim ownership rights to land within the BPPS because it is a protected area.¹⁰

In 2007, the government of Panama granted a concession to AES-Changuinola, a hydroelectric power company, for the Chan-75 hydroelectric dam project on Ngöbe land within the BPPS. This dam project will flood and therefore displace four existing Ngöbe communities (approximately 1,000 individuals) and affect an estimated 5,000 more if it goes forward. As has been well documented in other international petitions and reports, the granting of the concession and the undertaking of the hydroelectric project has occurred without consultation with the Ngöbe residents and without regard for their indigenous territorial rights under international law.¹¹

Indeed, the only opportunity for Ngöbe involvement was the general public comment period in January, 2007. In his May 2009 report following a visit to the community of Charco la Pava, the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples noted this fact with concern, reminding the government that the requirements of indigenous consent apply to all ancestral territory whether it forms part of a recognized Comarca or not. Finding that the government of Panama had not fulfilled the duty of consultation, the Special Rapporteur called on the State to take corrective measures to rectify the situation.¹² Despite these findings by the Special Rapporteur and precautionary measures granted by the Inter-American Commission on Human Rights calling to suspend the project, the State has not taken action and allows the project to continue.

Since the commencement of the project, the government took a hands-off approach and allowed the Company to handle all negotiations with community members without state involvement to ensure that international rights are not violated, a fact which also alarmed the Special Rapporteur.¹³ This has in fact resulted in the use of coercion and deception as detailed in the community's 2008 Petition to the Inter-American Commission on Human Rights:

“Since at least May 2006, AES-Changuinola has sought to acquire Ngöbe landholdings on a family-by-family basis without heeding traditional Ngöbe land tenure practices. Using the prospect of large sums of money and the threat of forced evictions, AES-

⁹ *Id.* at ¶ 6.

¹⁰ Jeffrey D. Stein, *Resistance to Dam Nation: An Analysis of the Stance and Strategies of the Opposition Movement to the Chan-75 Hydroelectric Project in Bocas del Toro, Panama*, 12-13 (B.A. thesis, Wesleyan University, 2008) (based on author's personal interviews).

¹¹ Petition to the Inter-American Commission on Human Rights, submitted by Cultural Survival and Alianza para la Conservación y el Desarrollo, March 7, 2008; *see also Observaciones sobre la situación de la Comunidad*, ¶ 62 (“There are indications of the existence of traditional patterns of use and occupation of the land that create in the communities property rights to the places where they are actually settled and in the surrounding areas. Nevertheless, the State has not recognized or guaranteed these rights, and the [Chan-75 hydroelectric dam] project apparently was conceived and has advanced without consideration of the possibility that they could exist.”).

¹² *Observaciones sobre la situación de la Comunidad*, ¶ 28.

¹³ *Observaciones sobre la situación de la Comunidad*, ¶ 35.

Changuinola has lured heads of families, many of whom do not speak Spanish or are illiterate into signing documents that purportedly give rights to AES-Changuinola in exchange for money or other alleged benefits to the individual or family. In many cases, AES-Changuinola did not provide copies of these documents to family members; in others it advised them not to show the documents to anyone. Many people who signed such documents are either illiterate in Spanish or speak only Ngöbere. Many of these had one impression about what they were agreeing to when they signed and only later discovered that AES-Changuinola interpreted those documents to mean that the company had the right to destroy their landholdings for the purpose of dam construction. Many Ngöbe who initially refused to sign contracts with AES were harassed or bullied by the company and state and local government officials into doing so.”¹⁴

Several members of the affected communities report that they were threatened and intimidated, having been told that if they did not sign they would lose their rights and property and end up with nothing. One woman’s story of intimidation has been particularly publicized and garnered international attention. The following is an excerpt from an article published by Cultural Survival, a respected non-profit advocacy group for indigenous peoples worldwide, telling her story (we have removed her name for privacy reasons):

“[Her] story started in January 2007, when AES-Changuinola flew her and some family members to the company’s offices in Panama City. She thought she was going for a *paseo* (a holiday). They took her on a city tour and then to AES’s offices on the 25th floor of an office tower. [She], having never been in a city before, had no idea how to use the elevator. Once inside their offices, Humberto Gonzalez, the company’s chairman, and Celia Bonilla, a Ngobe woman who works for AES, told her that they needed to get her agreement to sell them her land that same day. [She] understood them to mean that she could not leave their offices unless she signed. With no money for the return flight, she was dependent on the company for transportation. After 10 hours in the office she finally put her thumbprint on a prepared Spanish-language document she could not read so that she could go home.

“The company knew, of course, that the circumstances of her signing were questionable, so, between January and October, they took a carrot-and-stick approach to convincing her to leave. Somebody would come to her house and threaten that the police were about to move her off the land. A day later, someone else would come with food for the entire family and promises about

¹⁴ Petition to Inter-American Commission on Human Rights, *supra* note 11.

their bright future after she moved. The mayor of Changuinola tried to convince her to agree, as did the governor of Bocas del Toro province. They assured her that they were looking after her interests by making sure she got the best deal possible, but that she had to leave.

“On July 20, representatives from the Changuinola mayor’s office and a bulldozer pulled up to the edge of her house. [She], who was then sick in bed, fainted. The mayor’s representatives took her to the hospital in Changuinola to be checked out, and then to the house that AES had built for her. Thinking the bulldozer was knocking her house down right then and there (they weren’t; it was just intended to scare her), she begged them to let her go home right away, but the mayor’s representative said she had to stay in town. She stayed up all night crying.

“In August and September the company persuaded two of [her] nearby daughters to sign and knocked down their houses. The intimidation then intensified to the point that in late October Isabel gave in. She ‘signed’ a second document of sale of her land (again in unreadable Spanish) that increased the amount of money she was offered. [She] still doesn’t understand what she sold, but it is clear that AES believes it now owns all of [her] and her family members’ land.”¹⁵

This particular story is a powerful illustration of a widespread pattern of deception and coercion. Another woman’s story again the company’s disregard for Ngöbe land ownership norms and suggests that the company is only concerned with the superficial appearance of consent by collecting signatures and disbursing money:

“Another tactic AES used was to meet with family members who had moved to Changuinola or other urban areas and seek their consent. For example, in the case of [name removed for privacy reasons], a Ngöbe widow who does not speak Spanish, AES contacted her daughter [C], who lives in town, and offered her \$36,000 for an agreement to build a road on her mother's land. The daughter signed and accepted the money but warned the company that she was not the land owner. When the rest of the family learned of the transaction they sent AES-Changuinola a letter signed by all other family members repudiating the agreement. Yet the company went ahead and plowed the road through [the] land without her consent.”¹⁶

¹⁵ Ellen L. Lutz, *Dam Nation*, CULTURAL SURVIVAL QUARTERLY (Winter 2007).

¹⁶ Petition to the Inter-American Commission on Human Rights, *supra* note 11.

In fact, there is not consent for the project on a community level, as the Special Rapporteur experienced during his visit and described in his report. He noted one meeting in particular, organized in collaboration with agents of the company, held in a community cited by the company as supporting the project, and attended by agents of the company and community members employed by the company. Even in this setting, each individual that spoke expressed opposition to the project.¹⁷ As a result of these findings, the Special Rapporteur “urgently” requested that Panama take steps to protect the communities and investigate alleged violations of human rights, and adopt preventative measures for the future.¹⁸ To date, not only has Panama not taken these steps, but the project continues to move forward with the support of state police forces. The Special Rapporteur noted after his visit:

“In accordance with the contract for police security signed on March 13, 2008 between the National Police and the company AES Changuinola, there exists a permanent police presence in the zone of construction of the project. The contract has the purpose, according to the State, of ‘guaranteeing a climate of peace and security in the community as well as in the area of construction.’ Nevertheless, members of the community of Charco la Pava expressed to the Special Rapporteur their feeling that the police presence in the zone has as its principal objective to assure that the construction continue on course, without interruption, and less so to assure the physical security of the community... In any case, the Special Rapporteur considers that the contractual relationship between the security forces of a state and a company can be problematic, insofar as it has its own interests that cannot always correspond in all aspects with the public interest.”¹⁹

This irregular police force was established in January 2008 after the forced eviction and incarceration of Ngöbe protestors in the Chan 75 dam site. The police units who participated in this operation beat, humiliated, and hid information about the indigenous peoples who were detained, including a pregnant woman and several minors. Reacting to the situation, the Ngöbe initiated a peaceful protest against the project. The protestors met with a violent reaction from AES -Changuinola and from the government of Panama. Cultural Survival reported:

“[On] January 3, [2008] the company and the government brought in a squadron of police in riot gear who attacked the protestors with clubs. They broke the nose of a nine-year-old boy and injured his sister’s arm. They knocked down and sexually humiliated a woman carrying a three-year-old child on her back, and knocked down a sixty-year-old man, grinding his face into the dirt with a

¹⁷ *Observaciones sobre la situación de la Comunidad*, ¶ 29.

¹⁸ UN Press Release, *United Nations Expert on Indigenous Peoples denounces human rights violations committed against the Charco la Pava community in Panama* (Aug. 8, 2008).

¹⁹ *Observaciones sobre la situación de la Comunidad*, ¶ 53.

boot. They arrested 54 people, including 13 children and 2 infants, taking them to a jail in the city of Changuinola.”²⁰

In addition to these physical threats and attacks, the hydroelectric dam project attacks the dignity of the Ngöbe as a people. In furtherance of the development project, AES-Changuinola has initiated a public campaign that features discriminatory and offensive materials disparaging indigenous ways of life. Video advertisements released by the company tout their “voluntary relocation program” by comparing indigenous residences with modern, western-style homes that will supposedly be provided as replacements to affected communities. These videos depict indigenous life ways as backward and outdated, encouraging a discriminatory view of indigenous peoples who chose to continue a more traditional lifestyle (or oppose development on their lands) and perpetuating negative stereotypes of indigenous peoples.²¹ These materials have yet to be denounced by the government, which instead appears to support the Company’s plan to “modernize” indigenous ways of living.

As a matter of fact, after assuming office on July 1, 2009, the new presidential administration of Ricardo Martinelli has followed a policy of deception to legalize the abuses committed by AES. Instead of conducting open meetings with the communities according to Ngöbe customs, government officials and AES representatives have been conducting back room negotiations with a reduced number of community representatives. These “negotiations” have resulted in two agreements signed in Charco de La Pava in October and in Panama City in November. Both of these agreements fail to respond to Ngöbe concerns for land and informed consent expressed to international human rights bodies. Instead, the agreements contain unwarranted promises of collective land titles and community aid through revenues generated with carbon trading. No mention is made about the unfulfilled obligation of the Government to protect Ngöbe lands in the Changuinola River Valley through the creation of annex areas according to Law 10 of 1997 that created the Ngöbe-Bugle Comarca (cite report of the World Bank Inspection Panel).²² This delay in the allocation of collective lands leaves thousands of indigenous residents in a situation of absolute vulnerability.

B. The Naso Communities of San San and San San Druy

Much of western Bocas del Toro province of Panama is ancestral Naso territory. Included in this ancestral territory is Finca No. 102 and the Bonyik Watershed. This plot of land was entered into Panama’s public registry under the name of the United Fruit Company in 1914 without regard to the indigenous Naso population historically inhabiting this area, and then transferred to a ranching company, Ganadera Bocas, in 1973. This historic injustice – which continues to have immediate and serious consequences for the Naso - should be addressed by the recognition of a Naso Comarca. The Naso have been calling

²⁰ Cultural Survival, *Panama Dam Construction Steps up the Pace*, CULTURAL SURVIVAL QUARTERLY (Spring 2008) (available at <http://www.culturalsurvival.org/node/8195>).

²¹ See for example AES Changuinola – Reasantamiento Participativo, available at <http://www.youtube.com/watch?v=MWg-siqh7Kk>

²² The World Bank Inspection Panel, Report and Recommendation: Panama: Land Administration Project (Loan No. 7045-PAN), Report No. 49004-PA (Jun. 19, 2009).

for the recognition of their Comarca, Naso Tjer-di, for nearly 40 years with no result. For the Naso, then, Article 127 of the Political Constitution of Panama, which provides that the state shall guarantee to indigenous communities the reservation of the necessary lands and collective property for the achievement of their economic and social wellbeing,²³ rings hollow. In practice this provision has provided them no protection.

In June 2004, the Panamanian National Assembly rejected a law project creating a Naso Comarca. Although a new proposal was presented to the following legislature in September 2004, the National Assembly suspended examination of this law project, and instead enacted a general framework law for the creation of collective lands around the country, Law 72 of 2008. This law included a specific article, number 17, which referred to the approval of an organic charter for the Corregimiento Comarcal Naso.

Since the approval of this law, the Naso have rejected the application of this legislation, arguing that they are being discriminated by not receiving equal rights with the rest of indigenous peoples in Panama whose lands are being protected through a comarca. Most importantly, Law 72 denied the Naso right to self-determination, and instead placed them under the authority of a *corregidor* that would be appointed directly by the Mayor of Changuinola where the Naso are a minority. The Naso reject this legislation because it was developed entirely without their input or participation, and because it does not adequately respect their traditional leadership structure.

Because of the government's inaction with regards to Comarca status, the Naso have had to suffer the indignity of eviction orders executed against them on their own land. Ganadera Bocas, a ranching company which now claims title to Finca No. 102, initiated the first eviction action against several Naso individuals in June 2006, and new actions before the *corregidor* of Teribe followed in July and November of 2008.²⁴ The result of these actions was an eviction order, a written copy of which was eventually provided to the Naso in April 2009. But by this time, several Naso houses had already been destroyed by heavy machinery operated by Ganadera Bocas, which claimed authority under the order, in a series of extremely traumatic events. The government has never revoked this eviction order.

There are also clear indications that the National Police has also signed private agreements for the protection of the properties of Ganadera Bocas and Hidro-Ecológica del Teribe, yet these documents have never been made available to the public. In addition, in 2006, the Mayor of Changuinola signed a private agreement with Ganadera Bocas that was publicly denounced by the representative of El Teribe.

Community member Nilsa Aguirre reported that, early in the morning of January 16, 2009, machinery from Ganadera Bocas entered her village and destroyed 6 homes, also causing environmental damage to the river (by crossing through it) and damaging community roads. She said she was given a few days to leave her home since it too was

²³ Constitución Política de la República de Panamá, Art. 127.

²⁴ A *corregidor* is a lower-level police authority with the power to settle minor disputes and order evictions. Eviction orders on file with ACD.

to be destroyed. Eliseo Vargas, another Naso community member, broadcast this report and reiterated that the tragedy could have been avoided had the government demarcated a Naso Comarca.²⁵

On March 30, 2009, employees of Ganadera Bocas arrived in San San with tractors in order to destroy Naso houses located on disputed land. The company employees were escorted by a contingent of approximately one hundred and fifty police sent by the provincial authorities. The contingent arrived in the community demanding that the indigenous Naso leave their houses within 15 minutes – barely enough time to gather their belongings. The police then proceeded to use tear gas to enforce these demands. The operation was led by the *corregidor* of Teribe, Aracelys Sánchez. The company employees used the tractors to destroy 30 houses. More than 40 families were affected by the destruction and left without food or shelter. The police proceeded to use tear gas on children, who suffered serious injuries and poisoning as a result.²⁶

The communities attempted to rebuild their homes with scraps of material remaining on the scene. However, the police occupied the area and erected barriers across the pedestrian road, obstructing free passage of people through the area. In this operation, the police occupied the Naso Cultural Center, and allowed the machinery of Ganadera Bocas to destroy this symbol of Naso identity. Again on April 22, 2009, the national police accompanied machinery operated by the company as it leveled the structures that the community had rebuilt. On April 24, 2009, a delegation of the Fifth REDLAR Mesoamerican Forum witnessed the destruction of crops, the Naso Cultural Center (a community project supported by National Geographic and which also served as the school), a church, and other community structures since the eviction began on March 20.²⁷

The threats against the Naso communities continued. In a letter dated May 18, 2009, Akin Gump and ACD reported to the Inter-American Human Rights Commission:

“Over the weekend of May 9-10, 2009, representatives from the Ganadera Bocas, S.A. (Ganadera Bocas or the company) used heavy machinery to rip out trees along the San San River, damaging a footbridge that led to the area’s residences. Ganadera Bocas personnel then blocked the road leading to eight indigenous communities in the region by opening a deep trench in the road... In addition to these actions which have disrupted the natural resources of the area, Ganadera Bocas personnel have also become increasingly bold in their threats to the Naso people. Roberto Audibeth is the Ganadera Bocas foreman in charge of overseeing the work of the company’s machinery in the area of the San San and San San Druy communities. On May 11, 2009, Mr. Audibeth drew his gun at a group of

²⁵ Request for Precautionary Measures to the Inter-American Commission on Human Rights, submitted by Akin Gump Strauss Hauer & Feld LLP and Alianza para la Conservación y el Desarrollo on behalf of the Pueblo Indígena Naso en Panamá (April 29, 2009).

²⁶ *Id.*

²⁷ *Id.*

Naso members and threatened to shoot individual Naso people if they did not leave the territory in dispute... Throughout these incidents, Naso families who refuse to leave the territory have nevertheless been forced out of their homes, many of which have since been destroyed. These families are currently camping in the region with limited access to shelter and resources.”²⁸

The supplementary letter mentioned above also describes the government’s backing of the company’s violent actions: “Much of the violence and disruption being carried out against the Naso is occurring at the direction of, or in coordination with, state actors in Panama.”²⁹ These include the executing and enforcing of illegal eviction orders at the request of the company, escorting company employees with heavy machinery into the communities for the purpose of destroying homes, crops, and community buildings, and issuing detention orders against leaders of the Naso community, as previously mentioned.

Community members have reported state involvement as well. In a letter to the Jefe de la Dirección Nacional de Responsabilidad Profesional de la Policía Nacional describing the incident when Roberto Audibeth of Ganadera Bocas pointed his gun at a Naso community member, leaders of the San San Druy community commented: “Ironically all of this has been happening in the presence of the uniformed police who have done nothing more than watch what happens and prefer to remain silent and continue guarding the destruction that the company is causing.”³⁰ The same letter continues,

“Mr. De Leon it is very important that you take urgent, clear, and objective action against the actions of these police since the institution of the police is very poorly represented by such elements as the police is no more than public servants and are thus obliged to guarantee the security of society in general and not become part of and complicit in a crime which constitutes a flagrant violation of constitutional standards.”³¹

Following these events, the Naso in San San and San San Druy once again rebuilt small houses for shelter using material left in the area from the destroyed buildings. During a July 2009 visit to these communities by the authors of this shadow report, community members reported that they lived in constant fear that the company would return again with bulldozers to level their houses a third time and that they were unable to sleep well at night due to their constant state of fear and uncertainty. Indeed, these fears were not unfounded, as approximately 150 police again invaded the community on November 20, 2009. The police again used tear gas to eject 200 Naso community members from their homes.³²

²⁸ Supplementary Letter to Request for Precautionary Measures to the Inter-American Commission on Human Rights, submitted by Akin Gump Strauss Hauer & Feld LLP and Alianza para la Conservación y el Desarrollo on behalf of the Pueblo Indígena Naso en Panamá (May 18, 2009).

²⁹ *Id.*

³⁰ Letter on file with ACD.

³¹ *Id.* (translated by shadow report authors).

³² UN Press Release, *Panamá: Experto de la ONU Condena Los Desalojos de las Comunidades Naso y Exhorta el Diálogo* (Nov. 25, 2009).

After the Inter-American Commission on Human Rights (IACHR) granted precautionary measures to the Naso of San San and San San Durui, the General Director of Indigenous Policy, Jose Isaac Acost publicly downplayed the importance of the events occurring in these indigenous communities.³³ Furthermore, the Government of Panama canceled a meeting that was scheduled for December 10 to discuss the creation of the Naso Comarca. No new date has yet been determined to hold this meeting.

In addition, in June of this 2009, the National Environmental Authority (ANAM) granted a concession of 1,246 Ha. of the Bonyic Watershed in the Palo Seco Protected Forest in favor of the private company Hidro-Ecológica del Teribe (HET), mostly owned by Empresas Publicas de Medellín (EEPPM), for the construction of the Bonyic Hydroelectric Project within the Naso Territory.

Throughout all of these events, Naso community members have continued their efforts to achieve Comarca status on ancestral Naso territory. For example, in a December 23, 2008 letter to President Martín Torrijos, the San San Druy community reiterated that they had been fighting for 38 years to get a recognized Comarca and that the disputed lands were ancestral Naso territory. The community also reminded the government that the problems with Ganadera Bocas could have been avoided had the government demarcated the Comarca in the first place.³⁴ A group of Naso community members camped for nearly three months in a plaza gazebo in Panama City, risking their health and safety, in order to draw attention to their cause and send a message to the government. After leaving the plaza on a gesture of good faith towards the new government, the Naso returned in September. In response, the *corregidora* of San Felipe in Panama City issued an eviction order from the plaza that was enforced by the National Police on September 23. When a group of Naso tried to return to the peaceful protests on October 2, they were detained for two days in Panama City. Despite these efforts, no further steps have been taken by the State to define a Naso Comarca.

The Naso are frustrated that after nearly 40 years of working to gain Comarca status, they still have received no answer from the government, which to them appears to care more for large companies than for vulnerable Panamanian citizens. They are also frustrated that while the law proclaims one thing, the reality for them is quite different. The Naso desire a Comarca because it represents legal recognition of the rights to lands that have always been theirs, in conformance with national and international law, and security for future generations.

C. The Indigenous Ngöbe Residents of the Bocas del Toro Archipelago

A series of poorly drafted laws meant to encourage tourism development and real estate speculation in Panama has instead resulted in the dispossession and often violent eviction of indigenous Ngöbe residents of the Bocas del Toro Archipelago from their homes, yet Panama has not taken steps to remedy the situation. Instead, the Government has passed two new laws that could further complicate the precarious situation of the indigenous

³³ *Acosta considera que la CIDH 'exagera' situación de naso*, LA PRENSA, Dec. 9, 2009.

³⁴ Resolución No, 8, 23 de Diciembre, 2008 (on file with ACD).

inhabitants of the Bocas del Toro Archipelago. Law 2 of January 7, 2006 allows for concessions of up to 60 years (renewable for an additional 30) in certain circumstances when a proposed tourism project's amount of investment requires it and the potential for the project to create jobs justifies it. Law 2 also allows for the sale of island land for certain tourism development projects. The purpose of Law 2 is to encourage investment in tourism development as a means of improving the local economy. Law 2 has had a direct and significant effect on the indigenous population on the islands in the Bocas del Toro Archipelago.

To facilitate the granting of concessions, Law 2 creates a “*Ventanilla Única*” in the Cadastral Office of the Ministry of Economy and Finance. The *Ventanilla Única* (or “Express Window”) is charged with accepting, processing, and approving all applications for concessions in areas demarcated for tourism development under the law. Among the requirements for an application for a concession under this process are a plan for the property, a project budget, proof of financing, proof that the land is within a tourism development area, and an environmental impact study. Based on such information, it is up to the Cadastral Office (or the *Catastro*) to approve the concession. Furthermore, island lands may be purchased specifically for tourism development if approved by the *Catastro* under a similar application process. Before Law 2, island lands could not be sold and converted to privately titled land.

Law 2 does include some protections for people already living on lands demarcated for tourism development. The most important of these protections are found in Article 26. Under Article 26, individuals who can show uninterrupted, actual possession (*derechos posesorios*) for two years prior to the enactment of the law are entitled to a concession of 90 years, and are not required to post a bond or to pay the concession lease as normally required. Under this provision, uninterrupted actual possession must be certified by a site inspection by the office of the *Catastro* in coordination with the local authorities. According to interviews with a respected community leader, this task is more often carried out by local authorities.

Under Article 27 of Law 2, a corporation that properly purchases *derechos posesorios* from an individual resident in the area who meets the Article 26 requirements for a concession based on prior possession will be subrogated in the rights of such person for the purposes of obtaining the concession.

In practice Law 2 has an adverse effect on indigenous peoples by fostering fraudulent land claims that displace indigenous and other vulnerable residents. While in theory the law protects prior residents, land developers and speculators have circumvented this law to displace people who were living in valuable island properties. Many of these residents do not know their rights under the Panamanian Constitution, indigenous, and property legislation and cannot afford lawyers. Developers and speculators use a combination of threats, deceit, and force to pressure people to abandon their lands, many times without any other viable alternative in such a high real estate value coastal area.

According to interviews with community leaders and members, the following is a common occurrence resulting from these conditions: with the help of corrupt local officials, individuals obtain a certification that they own island property, claiming that they have (or their family has) been in possession of a piece of land for the required amount of time. Developers and speculators measure out the land and bribe the local officials, including the *corregidores*, to make the site visit and certify possession and occupation as required by Article 26. At times, the site visits are not carried out at all and local officials simply sign off on the certification. Through this process, the individuals who have obtained the certification could be able to return to the plot of land and announce to those people actually occupying the land (often indigenous Ngöbe) that they have no right to be on the land and that they must leave. The holders of the concessions could then use the force of law to eject the residents from the property. In addition, Panamanian legislation only affords people the possibility of recurring to *corregidores* when confronted with any threat to their land, life, and property. Unfortunately, the *corregidores* have direct authority over the police and have themselves been involved in a number of forceful evictions in the Province of Bocas del Toro either by action or omission with the complicity of the next hierarchical level, the mayors. In fact, then, the representatives of developers and speculators, usually foreigners and wealthy Panamanian, normally receive the support of the local authorities,

Indigenous people in the archipelago are often approached by lawyers, local officials, or both and told that they must sell their *derechos posesorios* because if they do not, the government is going to sell the land out from under them anyway and they will lose everything. This is perhaps unsurprising given the previously mentioned incentives created by Law 2. If a corporation or developer can purchase *derechos posesorios* recognized under Article 26, they could potentially benefit from the advantages provided by that Article, including a longer concession period. However, even if the corporation or developer does not inherent these special advantages, they must convince people already there to give up any claims which would entitle them to the concession under Article 26. That way the corporation or developer clears the way to get their own property rights.

Although Law 2 has seldom been applied, the existence of these conditions has led to chaos in the Bocas Archipelago. Indigenous residents are unsure of what their rights really are and are frequently ejected (with the use of police force) without understanding why. In these operations, eviction orders issued by *corregidores* allow for all kinds of abuses. Despite these conditions, the government has not acted to revise the law or otherwise protect indigenous and other vulnerable island residents. Instead, the Government has passed two new laws in 2009 that promote island property speculation and will lead to further occasions of violence and abuse.

Furthermore, as in Changuinola River Valley, several of the Archipelago communities were expressly mentioned as annex areas, or meet conditions to be declared annex areas, under Law 10 of 1997. However, the Government has never implemented this provision of the law, more than ten years after the period established in this legislation. As a result, many of the lands that should have been protected as annex areas have legally or illegally

passed to the hands of real estate developers and speculators, in detriment of the collective rights of the Ngöbe people in places such as Cayo de Agua and Shark Hole.

Beyond corrupt state officials and the use of *corregidores* to secure land titles and ejection orders affecting indigenous families, Panamanian police have also acted more as the personal security forces for developers than as public servants. Panamanian law establishes that legal evictions must be implemented without the violation of human rights and constitutional guarantees, and eviction orders only pertain to the removal of unauthorized individuals, and not to the destruction of the property of these individuals. In spite of this legal provision, police forces in Bocas have escorted private actors in threatening, mistreating, and destroying the property of indigenous residents in a systematic manner, and in some cases, these actions have involved private contracts between the national police and private companies.

Many indigenous residents in the area have witnessed their homes knocked down with heavy machinery and burned as the police stood by and watched. For example, in October of 2008, police arrived in Cayo de Agua in the Bocas Archipelago, along with the attorney of a private developer who claims to have bought the area, saying there was an order from the President of the Republic of Panama that they had to leave their houses.³⁵ When people asked for a copy of the order, the police said they could have their lawyer request a copy from the court on Isla Colón, which is about two hours by boat from Cayo de Agua.³⁶

The police returned the next day, along with the developer and his attorney. They evacuated community members from their homes and proceeded to knock down houses. The developer and attorney were accompanied by workers who dismantled the houses with power saws and other tools.³⁷ Then they cut up the wood from the houses into small pieces.³⁸ According to community reports, the police put a gun to the head of a pregnant woman resident, threatened her, and pushed her, causing complications with her pregnancy requiring hospitalization.³⁹ Many residents report similar episodes of violence and intimidation in other areas of the archipelago.

III. The ICERD and Indigenous Rights

Not only is discrimination against indigenous peoples within the scope of the ICERD, but the Committee has confirmed that the violation of certain internationally recognized indigenous rights can be considered racial discrimination against indigenous peoples, and is therefore prohibited, under the Convention.

³⁵ Interview with local community leader, July 23, 2009.

³⁶ Janeth Anderson, Executing Official, Informe de la diligencia de desalojo y entrega de bien inmueble (Oct. 10, 2008) (on file with ACD).

³⁷ *Id.* at 63.

³⁸ Interview with local community leader, July 23, 2009.

³⁹ *Id.*

International norms protecting indigenous rights have often grown out of the recognition that present events have their roots in a long history of viewing indigenous peoples as inferior and undeserving of, or incapable of having, basic rights enjoyed by other groups. In this way, indigenous peoples have been disadvantaged by discrimination in a classic sense. However, due to the particular historical context, *discrimination* in the context of indigenous peoples may include the non-recognition of certain rights, such as rights to ancestral territory, which are not necessarily applicable to other groups. For this reason, international indigenous rights norms must be considered as the backdrop against which we identify and define *discrimination* against indigenous peoples in particular.

CERD General Recommendation XXIII embraces this particularized view of discrimination against indigenous groups as it calls upon State parties to recognize particular indigenous rights protected in important international instruments and opinions of international bodies. These include respecting and promoting the preservation of indigenous cultures and ways of life, ensuring that no decisions affecting indigenous rights and interests are taken without informed consent, and recognizing indigenous rights to traditional territories which includes the return of lands taken without consent.⁴⁰ Thus, the failure to take these steps or to respect internationally recognized indigenous rights amounts to discrimination against indigenous populations on account of their racial or ethnic status as indigenous. Because these norms are so important to the identification and definition of discrimination in this context, this shadow report discusses international instruments and opinions beyond the ICERD in the following discussion of Panama's ICERD violations.

IV. Violations of the ICERD

A. Panama Violates Articles 2 and 5 by Failing to Fully Recognize Indigenous Territorial Rights

Articles 2 and 5 of the ICERD obligate Panama to fully recognize indigenous rights to land that are protected under international law. Article 2(1) provides:

“(a) Each state party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons, or institutions...

“(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists...

“(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization...”⁴¹

⁴⁰ CERD General Recommendation XXIII, at ¶¶ 4, 5.

⁴¹ ICERD, at Part 1, Art. 2(1).

Article 2(2) provides:

“State Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms...”⁴²

When interpreted in light of international norms of indigenous rights, the Article 2 prohibition against acts or policies of discrimination and the requirement for concrete measures requires recognition and protection of indigenous territorial rights. This includes the right to remain on ancestral territories and protection against forced removal.

Article 26 of the United Nations Declaration on the Rights of Indigenous Peoples⁴³ clearly states:

“1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

“2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

“3. States shall give legal recognition and protection to these lands, territories and resources...”

Article 10 states: “Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.” The preamble to the Declaration links the protection of these and other rights enumerated in the Declaration to norms of anti-discrimination when it reaffirms “that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind” and notes “that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources.”

The International Labor Convention No. 169 is equally clear about indigenous territorial rights.⁴⁴ Article 14 provides: “The rights of ownership and possession of the peoples

⁴² *Id.* at Art 2(2).

⁴³ Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES61/295 (Sept. 13, 2007).

⁴⁴ Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), June 27, 1989, 169 I.L.O. 1989.

concerned over the lands which they traditionally occupy shall be recognized,” and “Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.” Article 16 provides that “Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.” Finally, Article 17 states that “Persons not belonging to these peoples shall be prevented from taking advantage of their customs or lack of understanding of the laws on the part of their members to secure the ownership, possession or use of land belonging to them.”

In recognition of these norms, the CERD General Recommendation XXIII declares: “The Committee is conscious of the fact that in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises.”⁴⁵ The Recommendation continues:

The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.⁴⁶

Aside from the protection afforded under the accepted definitions of discrimination, Article 5 of the ICERD specifically provides for the protection of property rights:

“In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights... (d) Other civil rights, in particular... (v) The right to own property alone as well as in association with others; (vi) The right to inherit...”⁴⁷

⁴⁵ CERD General Recommendation XXIII, at ¶ 3.

⁴⁶ *Id.* at ¶ 5.

⁴⁷ ICERD, Part 2, Art. 5.

Most clearly expressed in the Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua, the Inter-American Commission and the Inter-American Court on Human Rights now generally hold that under international law, the right to property includes indigenous rights to ancestral territory, including those of a collective character and those created under indigenous customary law (as opposed to state law).⁴⁸ This background, combined with the fact that Article 5 specifically protects the right to own property “in association with others,” strongly indicates that Article 5 protects indigenous land rights which have historically been denied due to discrimination against indigenous peoples.

Indigenous property rights further include the right to free, prior and informed consent to activities affecting indigenous communities on their ancestral territories. The Declaration on the Rights of Indigenous Peoples provides in Article 32 that “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.” Article 6 of the International Labor Convention No. 169 requires consultation with the object of achieving agreement whenever consideration is being given to legislative or administrative measures which may affect indigenous peoples directly, and Article 15 of the same specifically requires consultation prior to the exploitation of resources on indigenous ancestral territories. The CERD embraces these requirements for consultation and consent in General Recommendation XXIII, calling on states to ensure that “no decisions directly relating to [indigenous peoples’] rights and interests are taken without their informed consent.”⁴⁹

Articles 2 and 5 of the Convention thus protect Ngöbe claims to territory within the BPPS and require their free, prior and informed consent to both development of and removal from these lands. In violation of Articles 2 and 5 of the Convention, however, Panama fails to adequately recognize and protect Ngöbe claims to territory within the BPPS. Panama has given a concession of 6,215 Ha. of this territory and allowed AES – Changuinola to engage in manipulative and fraudulent behavior to achieve nominal consent to confiscate territory and relocate entire Ngöbe communities. This process has occurred without real, meaningful consultation, and the construction and relocation projects are going forward without the free, prior and informed consent of the Ngöbe people as required by international norms discussed in this report.

Articles 2 and 5 of the Convention also entitle the Naso to recognition and protection of their territories. Panama’s refusal to demarcate a Comarca for the Naso people, as it has done for other indigenous peoples within its borders, thus constitutes a violation of Articles 2 and 5 as well. The use of Panamanian police forces to remove Naso people from their villages and the destruction of their homes further violates the protection against forced removal that forms a part of indigenous territorial and property rights. In order to comply with Articles 2 and 5 of the Convention, Panama must afford legal

⁴⁸ *Case of Mayagna (Sumo) Awas Tingni Community v Nicaragua* IACtHR Series C 79 (2001); 10 IHRR 758 (2003) at ¶ 148, 149, 151.

⁴⁹ *CERD General Recommendation XXIII* at ¶ 4(d).

protection to Naso territorial rights through a process that includes real, meaningful consultation with Naso communities.

In the Bocas Archipelago, Panama violates Articles 2 and 5 of the Convention by allowing the State's legal process to be used as a mechanism facilitating the displacement of indigenous persons and families from their homes. Not only has the government failed to take remedial measures despite notification that the effects the laws in practice is actually increased dislocation of indigenous island residents from their lands, but it has allowed the use of State police force to effectuate the evictions. Furthermore, the State has just passed two new laws that further promote land speculation and indigenous displacement.

B. The State of Panama Backs Private Companies in their Discrimination Against Indigenous Peoples and the Violation of their Human Rights for Reasons that are Connected with their Status as Indigenous Inhabitants of the Area, Thus Violating Articles 2 and 4 of the Convention

Articles 2 and 4 of the ICERD prohibit state backing of private discrimination. Article (1)(b) provides that “Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;” while 2(1)(d) provides that “Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.”⁵⁰ In addition, Article 4 provides that:

“State Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offense punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

⁵⁰ ICERD at Part 1, Art. 2(1)(b), 2(1)(d).

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.”⁵¹

Again, the interpretation of these Articles should be guided by international norms that consider the non-recognition of indigenous territorial rights to be within the definition of discrimination. Thus, any actions having their root in non-recognition of indigenous rights (including territorial rights), and inflicting harm upon indigenous peoples, is discrimination that the State must not sponsor, defend or support but rather must prohibit and seek to end under Article 2. Similarly, any organization that promotes the non-recognition of indigenous rights (including territorial rights) should be condemned, rather than supported, by the State under Article 4. This interpretation reflects the reality that non-recognition of indigenous territorial rights was originally justified by racist ideologies and that no acceptable justification has since replaced that.

It is the position of the authors of this shadow report that, when a state backs a company ostensibly in order to protect that company’s “private property rights” to land, yet both parties completely disregard indigenous land rights to the area, then both the state and the company are engaging in racial discrimination. The state is further supporting and ratifying the company’s discrimination rather than prohibiting and seeking to eradicate it as it should under Articles 2 and 4. There is no basis for the use of state force when that force serves to protect a private party that, through its actions, violently dispossess indigenous populations of lands to which they have internationally protected indigenous rights. Yet Panama continues to support private companies in their discriminatory actions against indigenous peoples within the State, particularly through the use of police force.

The disregard for the rights and ways of life of indigenous Ngöbe peoples (as a group and as individuals) shown by AES - Changuinola in its quest for nominal consent clearly falls under the definition of racial discrimination. This includes the direct treatment of the Ngöbe people by the company as well as the disparaging representations of their indigenous ways of life through public advertising campaigns. By abstaining from involvement in the negotiations in order to protect the rights of its citizens, the State of Panama supported the racism it should have been trying to eradicate. Furthermore, with the forceful use of State police, Panama continues to support the company in the advancement of the project, undertaken without the free, prior and informed consent that indigenous peoples on their traditional lands deserve under international law. Panama therefore continues to support, rather than eliminate, both racial discrimination under Article 2 and organizations that encourage racism under Article 4.

Similarly, by sending police escorts with Ganadera Bocas employees into Naso communities and standing by silently as they destroyed houses and threatened residents, the government of Panama has supported discriminatory treatment of the Naso by Ganadera Bocas in violation of Articles 2 and 4 of the Convention. The failure to protect the Naso from these incursions onto their rights lends support to private interests and the view that Naso communities and ways of life are not worth protecting and preserving.

⁵¹ *Id.* at Art 4.

The case of Cayo de Agua is another example of police acting as escorts and even participating in the violence as private interests destroyed houses and threatened residents of indigenous communities. As such it is another instance where Panama is in violation of Articles 2 and 4 of the Convention by actively backing private acts of discrimination.

C. Panama Violates Article 5 by Failing to Protect Indigenous Populations from Threats to their Physical Integrity, and by Perpetrating Violence Against Indigenous Communities

The ICERD protects indigenous peoples from threats to their physical and psychological integrity. Article 5 provides:

“In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:... (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution...”⁵²

While Article 5 protects Panama’s indigenous peoples against violent acts when perpetrated for any reason, such acts especially violate the spirit of the ICERD when they are perpetrated for the purpose of denying indigenous peoples their internationally recognized rights to traditional territory. The UN Declaration on the Rights of Indigenous Peoples specifically provides that “Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.”⁵³

This shadow report has enumerated several instances of physical violence and intimidation of indigenous peoples on the part of state officials. State police and their third party, private partners clubbed peaceful Ngöbe protesters including women and children. They used tear gas on entire Naso communities to facilitate their removal so that their villages could be leveled. They have drawn guns on Naso community members and indigenous residents of the Bocas del Toro Archipelago. All of this violence has occurred in the name of “private property interests” and in order to remove indigenous peoples from their territories in disregard for international indigenous rights as well as basic human rights and principles of dignity and respect. Through these actions, Panama is in clear violation of Article 5 of the Convention.

D. Panama’s Actions Further Violate Civil and Cultural Rights Protected Under Article 5

Article 5 of the ICERD provides:

⁵² ICERD at Part 1, Art. 5.

⁵³ Declaration on the Rights of Indigenous Peoples, *supra* note 44, at Art. 7(1).

“In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:... (d) Other civil rights, in particular: (i) The right to freedom of movement and residence within the border of the State... (vii) The right to freedom of thought, conscience and religion; (viii) The right to freedom of opinion and expression; (ix) The right to freedom of peaceful assembly and association; (e) Economic, social and cultural rights, in particular... (iii) The right to housing; (iv) The right to public health, medical care, social security and social services; (v) The right to education and training; (vi) The right to equal participation in cultural activities...”⁵⁴

The destruction of indigenous homes and communities directly and indirectly threatens these civil, economic, social and cultural rights. The rights of Ngöbe families to residence and housing, health, education, and participation in cultural activities have been violated by the destruction of their homes, communities, crops, and the environment vital to their sustenance and cultural activities. The violent police reaction to peaceful Ngöbe protesters violated their rights to freedom of opinion and expression and of peaceful assembly and association.

Similarly, the right to freedom of residence and the right to housing were also violated by the destruction of Naso homes. The destruction of the Naso community center, which also served as a school, interfered with the right to education guaranteed under Article 5(e)(v). The police blockade, the trench in the road, and the destruction of the foot bridge across the San San River all violate rights to freedom of movement as well as assembly and association. Furthermore, the destruction of the natural environment caused by the movement of animals and heavy machinery in and out of Naso communities has impeded their rights to cultural and religious freedom, and the education of younger generations in these activities.

Finally, the same rights to freedom of residence and to housing are violated by the dispossession of property and destruction of homes in the Bocas del Toro Archipelago. The violent and abrupt changes brought about by dislocation and destruction effect the rights of indigenous residents to continue their customary cultural activities as well. Panama therefore violates Article 5 of the ICERD in a myriad of ways through its violent treatment of indigenous residents.

E. Panama Violates Articles 2 and 5, and the Spirit of the ICERD When Indigenous Peoples are Disproportionately and Negatively Affected by Development Projects that Cause Harm to the Environment

Article 2(1) prohibits states from engaging in any act or practice of discrimination, or from sponsoring or supporting racial discrimination by any other persons or

⁵⁴ ICERD at Part 1, Art. 5.

organizations. States are further required to condemn and seek to eliminate racial discrimination by any persons or organizations in the state.⁵⁵ Additionally, Article 5 provides:

“In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights... (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution... (e) Economic, social and cultural rights, in particular:... (iv) The right to public health, medical care, social security and social services... (vi) The right to equal participation in cultural activities...”⁵⁶

The Environmental Justice Center published Proposed NGO Language on Environmental Racism for the occasion of the World Conference Against Racism in Durban, South Africa in 2001. The document describes environmental racism as “a form of discrimination caused by government and private sector policy, practice, action or inaction which intentionally or unintentionally, disproportionately targets and harms the environment, health, biodiversity, local economy, quality of life and security of communities, workers, groups, and individuals based on race, class, color, gender, caste, ethnicity and/or national origin.” Given this definition, environmental racism is an act of discrimination under Article 2 and a form of discriminatory violence or harm violating rights protected under Article 5. It is also a threat to the health of the community and to the community’s ability to continue important cultural traditions dependent on the natural environment. Furthermore, it violates the spirit expressed in the preamble and, indeed, in the very title of the International Convention on the Elimination of All Forms of Racial Discrimination.

The preamble to the ICERD expresses that States Parties are “Resolved to adopt all necessary measures for speedily eliminating racial discrimination *in all its forms and manifestations*, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and discrimination.”⁵⁷

In 2008, The Committee responded with concern to allegations of environmental racism against indigenous peoples in the United States. In the Concluding Observations, the Committee noted:

The Committee is concerned about reports relating to activities, such as nuclear testing, toxic and dangerous waste storage, mining or logging,

⁵⁵ ICERD at Part 1, Art. 2.

⁵⁶ *Id.* at Art. 5.

⁵⁷ ICERD, preamble (emphasis added).

carried out or planned in areas of spiritual and cultural significance to Native Americans, and about the negative impact that such activities allegedly have on the enjoyment by the affected indigenous peoples of their rights under the Convention (arts. 5 (d) (v), 5 (e) (iv) and 5 (e) (vi)).⁵⁸

The Committee continued: “The Committee notes with concern the reports of adverse effects of economic activities connected with the exploitation of natural resources in countries outside the United States by transnational corporations registered in the [United States] on the right to land, health, living environment and the way of life of indigenous peoples living in these regions (arts. 2 (1) (d) and 5 (e)).”⁵⁹ Through these observations the Committee signaled that the disproportionate concentration of negative environmental effects of development on indigenous communities is within the purview of the ICERD and violates rights to health, cultural activity, and non-discrimination under the Convention.

In addition, the UN Declaration on the Rights of Indigenous Peoples declares 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. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.”⁶⁰ The ILO Convention No. 169 further provides that “Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities,”⁶¹ and that “Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.”⁶² These instruments recognize the importance of the natural environment to indigenous peoples and cultures.

This shadow report has demonstrated some of the ways that indigenous ways of life are threatened by the environmental impacts of development projects in Panama. The negative effects of hydroelectric power, ranching, and tourism development are all disproportionately borne by the Ngöbe and Naso, while the benefits are reaped by others who often live very far away. The destruction of the natural environment in these locations threatens the ways of life developed by Panama’s indigenous inhabitants over thousands of years. We believe that Panama’s lack of concern for these consequences constitutes a violation of the ICERD.

⁵⁸ Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America, CERD/C/USA/CO/6, ¶ 29 (May 8, 2008).

⁵⁹ *Id.* at ¶ 30.

⁶⁰ Declaration on the Rights of Indigenous Peoples, *supra* note 44, at Art. 29 (1).

⁶¹ Convention Concerning Indigenous and Tribal Peoples in Independent Countries (No. 169) *supra* note 45.

⁶² *Id.* at Part II, Art. 7 (4).

V. Conclusion

In Panama there is a pattern of discrimination against indigenous peoples that is manifest in the inequitable and even violent treatment of indigenous peoples for the purpose of accessing and exploiting their lands, even while indigenous rights to those lands are protected under international law. Furthermore, development projects on indigenous lands in Panama are undertaken without respect for indigenous ways of life and utilize propaganda that encourages disrespect for and discrimination against the same. Finally, indigenous peoples in Panama are disproportionately affected by detrimental environmental effects of these development projects. These patterns put Panama in clear violation of the ICERD.