

GOVERNMENT RESPONSIBILITY FOR THE ABUSE OF THE HUMAN RIGHTS OF INDIGENOUS PEOPLES OF PANAMA

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This report is offered by Cultural Survival (CS), an international indigenous rights organization with a global indigenous leadership and consultative status with ECOSOC. Cultural Survival, which is located in Cambridge, Massachusetts, and is registered as a 501(c)(3) non-profit organization in the United States, monitors the protection of indigenous peoples' rights in countries throughout the world and publishes its findings in its magazine, the *Cultural Survival Quarterly* and on its website: www.cs.org. In preparing this report---based on wide consultation with expert organizations and individuals, field visits, and numerous unpublished documents---CS collaborated with student and faculty researchers at the Massachusetts Institute of Technology, including participants from Wellesley, Harvard, and Tufts Universities.

In the field of Indigenous rights, Panama has a thoroughly mixed record. On the positive side, the system of reserved territories called *comarcas* offers unusually strong protection for Indigenous lands and autonomy. Two governmental bodies address Indigenous concerns, as does a national ombudsman, the Defensor del Pueblo. Numerous plans and task forces target Indigenous poverty. Enlightened laws have been passed. Rural schools and health centers, though underfunded and unevenly distributed, are ubiquitous.

The gap between stated intentions and governmental actions, however, is huge. The office of Defensor has proved ineffectual; progressive legislation is often ignored; and many official plans and projects constitute mere window-dressing. The government consistently fails to protect Indigenous citizens, and when large-scale national development is at stake, it actively furthers their abuse. In all respects, the current Martinelli administration has not improved on the dismal record of its predecessors.

Indigenous Peoples---Kuna, Emberá, Wounán, Ngöbe (or Ngäbe), Buglé, Naso, and Bribri---numbered 285,000 in the year 2000, constituting roughly ten percent of the national population. Their lands, which encompass some of Panama's last remaining forests, are threatened by a recent wave of intensified exploitation of natural and social resources, especially mineral deposits, grazing pastures, rivers suitable for hydroelectric dams, and tourism.

The range of actual and imminent abuses is wide. A proposed international electric grid¹ will bring towers through the Ngöbe comarca in western Panama. In eastern Panama the towers will circumvent objections by Kuna and Emberá congresses and environmental groups by routing the line through a narrow gap between comarcas. Equally alarming, the government proposes relaxing environmental protections and ownership restrictions on mining, and in particular, re-opening the notorious Cerro Colorado copper mine, which in past years greatly harmed the Ngöbe.

Also of great concern are the deep poverty of Indigenous populations, child labor, endemic disease and malnutrition, and disregard for political autonomy and the rights of women.

In the limited space available here, attention focuses on three representative cases: a hydroelectric project on Ngöbe lands; uncontrolled tourism and land speculation in Bocas del Toro; and encroachment on Emberá lands in the Darién.² In each instance, the central issue is government failure to protect Indigenous land-holding.

THE IMPACT OF THE CHAN 75 DAM ON THE NGÖBE

As a member of SIEPAC³, a regional consortium for vastly increased production and international distribution of electric power, the Panamanian government and its private partners have embarked on a program of accelerated hydroelectric construction, placing multiple dams on almost every river in western Panama and causing dislocation, conflict, and severe threats to human rights, particularly those of Indigenous Peoples. On the Río Chiriquí Viejo, as of March 2010, four dams were already under construction and another sixteen in planning. In April 2010, campesino protestors on the Río Fonseca were attacked by police. In the Bonyic watershed a hydroelectric project was authorized in 2009 in traditional Naso territory, despite protests by a broad coalition of Indigenous and environmental groups. And on the Río Changuinola, Ngöbe inhabitants have been illegally displaced by the first of three dams, called Chan 75.

Work on Chan 75 by the firm AES Changuinola began in June 2007, *before* completion of all required environmental studies. The primary impact statement, from 2005, endorses the dam based on superficial criteria and a spurious calculus of pluses and minuses. A serious assessment of long-term consequences, either of a single dam or of three dams on one short river, is entirely lacking.⁴ Respected national and international studies indicate that the Río Changuinola dams will promote eutrophication, flooding, deforestation, colonization, and endemic disease, affecting both humans and animals.⁵

AES Changuinola and the government have failed to secure legitimate informed consent from inhabitants of the four communities displaced by the dam or from the several thousand Ngöbe who will eventually be affected, as required by the national environmental law, Law 41 of 1998. The company and the government are also in violation of Article 10 of the International Declaration on the Rights of Indigenous Peoples (hereafter “the Declaration”)---a conclusion confirmed by no less than three separate international reports and judgments. (See especially the report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya.)⁶

Failing to honor traditional Ngöbe collective deliberation (thus violating Articles 18 and 19 of the Declaration), AES has instead attempted to reach settlements piecemeal with individual families, in many cases long after construction began, pressuring them to sign documents few fully understood. Individual agreements have been misrepresented as community consent, opposition has been obscured, and, when pressured by construction deadlines, AES has bulldozed homes without owner permission. In this hostile environment, even Ngöbe who settle for compensation are by no means exercising free consent.

AES and the government have also violated the rights of Ngöbe opponents of the dam. A peaceful protest at Charco la Pava in early 2008 was attacked by club-wielding police. Fifty-four people, including thirteen children and two infants, were jailed (violating Article 7 of the

Declaration), and since then policemen hired by AES have illegally restricted movement in and out of the district (confirmed by a study participant in March 2010). All such illegal actions by AES are ultimately the responsibility of the State, both as highest legal authority and as 49% shareholder in the project.

Having exhausted all domestic remedies, in 2008 several Ngöbe communities, with the assistance of Cultural Survival, brought a case to the Inter-American Commission on Human Rights. The Commission called on Panama to stop all work on the dam until it could complete its review of the case. Panama ignored these admonitions, prompting the Commission to send a request to the Inter-American Court of Human Rights seeking provisional measures to halt construction. Aggressive construction of the dam continues to this day. Panama's open defiance of the Inter-American Human Rights system demonstrates a clear intention to delay and stall while the project is rapidly completed, and to ignore adverse judgments or recommendations.

TOURISM & DISPOSSESSION IN BOCAS DEL TORO

Tourism and expatriate retirement have increased exponentially in Panama since the early 1990s, fueled by low land prices, undeveloped coastline, accessibility, stable government, public security, and natural and cultural attractions. The results have included rampant speculation and land fraud; environmental damage; and dispossession of campesinos and Indigenous Peoples. Protective laws and international agreements have been widely disregarded, and the Panamanian government, in its eagerness to promote tourism, has done virtually nothing to check abuse.

The results of tourism exploitation are particularly egregious on the coast and islands of Bocas del Toro Province, where many Ngöbe inhabitants have been deprived of their land, forcing them to live in deplorable conditions. Although almost all Ngöbe in Bocas have legal rights to lands occupied for two years or more, many of them, lacking written titles, have nevertheless been dispossessed.

In some cases, Ngöbe individuals have sold parcels in which their kin or neighbors have rights; in others, non-indigenous Panamanians with tenuous or non-existent connections to the land have secured title. Typically, titles are swiftly resold to foreign investors, increasing the obstacles to legal redress. Ngöbe, lacking the necessary resources and knowledge, understandably lack faith in titling, and even those few who have obtained written deeds sometimes find themselves dispossessed as a result of administrative and judicial corruption. Foreign claimants have in several cases burned or bulldozed Ngöbe homes even before cases were resolved, sometimes with police looking on. A recent law concerning tourist lands, No. 2 of 2006, tips the balance even further towards non-indigenous claimants.

The consequences can be seen most vividly in La Solución, a Ngöbe settlement just west of the Bocas del Toro airport. Sandwiched into unwanted space over a former mangrove swamp next to open sewage holding tanks, the scrapwood houses on stilts lack all sanitary services: human waste and trash mingle in the water below with chemical and fecal runoff, and drinking water must be carried in. Deprived of subsistence farms as well as dwellings, residents of La Solución, like other Ngöbe, suffer from massive local price inflation driven by the tourist influx, resulting in widespread malnutrition. With no appropriate land left for relocation, makeshift

shanty towns like La Solución represent the future, if by no means a solution.

The Panamanian government cannot plead ignorance of the widely recognized social and environmental disaster in Bocas. Through its failure to act, as well through the corrupt actions of local functionaries, the State has violated a wide array of international measures forbidding racial discrimination and protecting Indigenous Peoples, most notably Articles 2 and 5 of the ICERD, Articles 1 and 11 of the ICESR; and Articles 8 and 10 of the Declaration, as well as national Law 10 of 1997 and Article 123 of the Panamanian Constitution.⁷

FAILURES OF COLLECTIVE TITLING IN EASTERN PANAMA

Indigenous lands outside the five comarcas have been subject to encroachment and theft, despite an article of the 1972 Constitution (No.123) guaranteeing Indigenous lands and collective land-holding. From 2001 through 2009, the World Bank financed a land-titling program called PRONAT, one of whose primary stated objectives was consolidation of Indigenous territories, including so-called Annex Areas bordering the Ngöbe comarca authorized by Law 10 of 1997. (PRONAT, widely regarded as a failure, is currently under reorganization.)⁸

Some Indigenous Peoples without comarcas who wished to hold their land collectively, notably large numbers of Emberá in the Darién, were encouraged by Law 72 of 2008, which enables collective titling, despite a lack of adequate Indigenous consultation on the law and widespread suspicion that it was intended to forestall a Naso comarca. Law 72 requires from applicants a plan or sketch of the proposed property, an official certification of population, and certification from the Dirección Nacional de Política Indígena.

A visit to the Emberá community of Arimay/Emberá Puru underscored official failure to adequately implement Law 72 in the face of massive colonization by non-indigenous settlers throughout the Darién. Since its legal founding as a community in 1969, Arimay's lands have been reduced by 90%, from 72,000 hectares to 7,572. They now face further losses.

Leaders of Arimay and of Emberá Tierras Colectivas, who include well trained lawyers, have been frustrated by the government's failure to establish the decrees and regulations needed to implement Law 72, with the result that the Dirección de Reforma Agraria (DNRA) reportedly still treats cases in terms of older regulations. Barriers to Indigenous claims include:

1. *Non-implementation and misinterpretation of Law 72 and excessive official demands.*

Although only a sketch map is required by Law 72, officials have demanded prior physical demarcation. Article 16 of the law offers funds for delimitation once a claim has been filed, indicating that demarcation need not occur first.

2. *Delays in processing and enforcement.* Despite clauses in the law (in Articles 5-7) very specifically requiring "priority" for collective claims and immediate action within thirty days, the DNRA has caused long delays. Among other things, these delays hamper collective response to individual incursions. Eight colonists are currently claiming two thousand hectares of Arimay land. If these invaders improve the lands by cutting trees or building structures, legal protections for de facto possession and use (*derechos posesorios*), often interpreted in colonists' favor, may

validate their claim, and if past disputes are any guide, Arimay may be forced by the DNRA to settle with the encroachers.

3. *Lack of protection for water and subterranean resources.* Cattle ranching upstream on the Arimay River on lands once held by the community has emitted chemicals and other pollutants and reduced water flow to a trickle through much of the year. Arimay has not been able to gain redress or remediation of the situation. Arimay leaders also complain that official agencies often interpret community land needs narrowly and disregard the conservation value of uncut forest.

Interviews with Indigenous leaders elsewhere, as well as other reports and documents, indicate that Arimay's dilemma is typical of those experienced by communities across eastern Panama. In such a situation, government action and inaction, in addition to violating the spirit and intent of Law 72, violates Articles 8, 27, 28, and 29 of the international Declaration, which call for "redress" or "restitution" or "compensation" as well as prevention for encroachment on Indigenous lands. They also violate Article 40, which calls for prompt, just and fair resolution of disputes; and Article 29, guaranteeing protection of the environment.

RECOMMENDATIONS

1. The government should **suspend all hydroelectric construction until rigorous procedures for informed consent and environmental assessment** are established, implemented, and applied to all projects, even those already underway. The scale of hydroelectric construction should be drastically reduced.

2. A **moratorium on land alienation** should be imposed (especially on sales to foreign investors) in areas where there have been persistent allegations of fraud and unwarranted dispossession. Law 2 of 2006 should be revised to balance the needs of tourism investors and longtime inhabitants.

3. Given the rapidity of illegal land alienation, justice delayed is justice denied. **Titling procedures should be streamlined and expedited** for current inhabitants, with provisions for on-site processing and rapid hearings for small-scale disputes. The judiciary should **ensure that all administrative and legal recourse mechanisms relevant to land titling are made available on an equal basis to Indigenous individuals**. For cases of alienation and dispossession, **court challenges must be promptly heard**. Neither "improvements" by settlers or tourist operators nor subsequent sales to third parties should take precedence over long-term occupation and use. Illegal alienation should be open to **retroactive challenge**.

4. **Titling and demarcation of collective lands and of annexed areas bordering comarcas should be expedited**. Forested lands under traditional, extensive, environmentally sound use should not be classified as "*tierras baldías*" or subject to unrealistically small allotments.

5. **Article 10 of Law 18 of 2003**, which removes protections for Indigenous lands and resources established in Law 41 of 1998, **should be repealed**, as should other recent environmental legislation diminishing Indigenous rights.

¹ See Interconexión Eléctrica Colombia Panamá S.A. (<http://www.interconexioncp.com/>).

² In addition to conducting interviews and reviewing documents, researchers for this report visited all three sites.

³ SIEPAC is part of Plan Puebla Panamá, renamed as the Mesoamerican Integration and Development Project (<http://www.proyectomesoamerica.org/main-pages/concepto.htm>).

⁴ Autoridad Nacional del Ambiente, 2005, *Estudio de impacto ambiental, Categoría III, Construcción y operación de la central hidroeléctrica El Gavilán (Chan 75)*. Panamá. Also Hydro Teribe, S.A., 2005, “Addenda: informe de aclaraciones.” Panamá. Alvarado, Ramón, 2006, “Addenda al estudio de la actualización ambiental del proyecto Chan 75.” Panamá. A Smithsonian report, touted in pro-dam propaganda, consists of a biological inventory, without impact assessments or mitigation recommendations (<http://biogeodb.stri.si.edu/bioinformatics/dfm/metas/search/stxt:Gavilan/type:Document>).

⁵ See for example the study showing high levels of pollution and disease vectors in and around the Bayano dam lakes in eastern Panama: Dr. Ernesto Martínez, Oct. 2009, “Informe técnico socio-económico sobre la indemnización de la comarca Kuna....” Congreso General Kuna de Madungandi.

⁶ UNHRC, 7 Sept. 2009, “Informe del Relator Especial sobre la situación de los derechos humanos y las libertades fundamentales de los indígenas, James Anaya: ...Observaciones sobre la situación de la Comunidad Charco la Pava y otras comunidades afectadas por el Proyecto Hidroeléctrico Chan 75 (Panamá).” “Addendum: summary of communications transmitted and replies received. Comunicación del Relator Especial de 20 de noviembre de 2008.”

See also: Audiencia Pública Tribunal Latinoamericano del Agua, Antigua, Guatemala, 12 de Sept. de 2008, Caso: Construcción de Embalses en los ríos Bonyic-Teribe y Changuinola en el Bosque Protector Palo Seco. Changuinola, Provincia de Bocas del Toro, República de Panamá. CERD, Feb-March 2010, “Examen de los informes presentados por los Estados partes de conformidad con el artículo 9 de la convención.... Panamá.”

⁷ Caroline Mayhew et al., Alianza para la Conservación y el Desarrollo, Jan. 2010, “Panama is in breach of its obligations... report submitted to the United Nations Committee on the Elimination of Racial Discrimination...” CERD, Feb-March 2010, “Examen de los informes presentados por los Estados partes de conformidad con el artículo 9 de la convención.... Panamá.”

⁸ The Inspection Panel, International Bank for Reconstruction & Development, March 2009, The Inspection Panel Register.... Country: PANAMA, Land Administration Project (Loan No. 7045-PAN).” Inspection Panel, June 2009, report No.49004-PA, “Report and Recommendation, Panamá: Land Administration project (Loan No. 7045-PAN)”