



**University of Oklahoma College of Law
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ANNEX

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I. EDUCATION AND CHILDREN'S RIGHTS

Domestic Undertakings

1. Panama provides free, compulsory primary education to all of its minor citizens. Education is administered by the Ministry of Education, an office of the national government. Realizing that access to education is often hampered by the poverty suffered by Panama's indigenous peoples, Panama has sought to increase access by providing subsidies to poor families that allow them to purchase required items for school attendance, such as shoes, and help defray the costs of transportation.¹ Panama has worked, with mixed results, to provide indigenous children with education that is culturally appropriate, including bilingual education.

International Obligations

2. Panama is a party to numerous international instruments that pertain to the rights of children, some of which specially address the rights of indigenous children. The Convention on the Rights of the Child, the Optional Protocol to the Convention on the Rights of the Child on children in armed conflict and the Optional Protocol on the sale of children, child prostitution and child pornography; the ILO Minimum Age Convention, 1973 (No. 138) and (No. 182) the Worst Forms of Child Labour Convention, 1999 in 2000; and the Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption in 1998. Article 13 of the International Covenant on Economic, Social, and Cultural Rights recognizes the right to education (section 1), and requires states parties to make primary education compulsory and freely available (section 2(a)). If a state party is unable to secure compulsory, free primary education in a

¹ Gobierno Nacional, Ministerio de Desarrollo Social, *Informe de Avance de la Red de Oportunidades*, 17 (Dec. 2008) available at: http://www.mides.gob.pa/wordpress/wp-content/uploads/2009/07/avance_diciembre_2008.pdf [Accessed Apr. 13, 2010] [hereinafter *Red de Oportunidades*]

period of two years, Article 14 requires that state to work out and adopt a plan of action for doing so. Articles 10, 11, and 12 also address rights that pertain to children.

3. Article 24 of the International Covenant on Civil and Political Rights protects children from discrimination, and Article 27 secures the right of ethnic minorities to preserve and participate in their own cultures, religions and languages; and requires that children be registered at birth. The Convention on the Elimination of Racial Discrimination requires that states parties guarantee the right to education without distinction as to race, color, or national or ethnic origin (Article 5(d)(v)). The Universal Declaration of Human Rights, although a declaration, is considered binding customary international law. The Declaration on the Rights of Indigenous Peoples, while not binding, does provide a framework for interpreting Panama's existing legal obligations to its indigenous peoples. Articles 11, 12, 13 and 15 list rights having to do with cultural, religious, and linguistic preservation. These rights affect children, because children have the right to learn about these practices. Article 14 discusses the right to education, and section 1 of that article states that indigenous peoples have the right to "establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning." Articles 17 and 22 also address rights of children.

Human Rights on the Ground

4. The indigenous peoples of Panama suffer a higher rate of illiteracy,² and rural indigenous women suffer an especially high rate.³

² United Nations Economic and Social Council, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Panama, Consideration of Reports by State Parties Under Articles 16 and 17 of the Covenant*, ¶ 12, E/C.12/Add.64, Sept. 24, 2001, available at:

5. While Panama makes an effort to register all children at birth, some indigenous and rural children remain unregistered.⁴ Lack of registration prevents Panama from knowing the full measure of how many indigenous children lack adequate nutrition, healthcare, and education, and may contribute to Panama's lack of adequate institutional presence in these communities⁵.

6. Two problems keep indigenous children from the full enjoyment of their right to education. The first problem is poverty. Poverty has numerous negative effects on the fulfillment of the right to education. Many indigenous children live in rural areas far from the closest schools.⁶ Additionally, their only form of transportation is by foot.⁷ This means that in order to attend school, these children must walk for as many as ten hours.⁸ Indigenous children also do not always own shoes,⁹ which not only increases the problem of transportation, but can effectively work as a bar to education, as Panamanian children are required to wear shoes to school.¹⁰ Poverty also leads to a high incidence of

<http://www.universalhumanrightsindex.org/documents/827/498/document/en/pdf/text.pdf> [accessed Apr. 13, 2010].

³ United Nations Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Panama*, ¶ 34, CEDAW/C/PAN/CO/7, Feb. 10, 2010, available at: <http://www2.ohchr.org/english/bodies/cedaw/docs/co/CEDAW-C-PAN-CO-7.pdf> [accessed Apr. 13, 2010].

⁴ United Nations Human Rights Committee, *Consideration of Reports Submitted by State Parties Under Article 40 of the Covenant [International Covenant on Civil and Political Rights], Concluding Observations of the Human Rights Committee: Panama*, ¶ 19, CCPR/C/PAN/CO/3, Apr. 17, 2008, available at: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/411/62/PDF/G0841162.pdf?OpenElement> [accessed Apr. 13, 2010].

⁵ *Id.* at ¶ 21.

⁶ *Red de Oportunidades*, *supra* note 1.

⁷ *Id.*

⁸ *Id.*

⁹ UNICEF, *At a Glance: Panama*, available at:

<http://www.unicef.org/infobycountry/panama.html> [accessed Apr. 13, 2010]

¹⁰ *Id.*

child labor.¹¹ Not only does Panama have an international obligation to protect its children from being forced to work, but this practice also prevent these children from being able to attend school. Malnutrition¹² is another result of poverty that is not only a violation of the right to health, but that also prevents children's enjoyment of their right to education.

7. The second problem is a lack of educational programs that adequately address indigenous children's unique needs. Many indigenous children speak Spanish as a second language, if at all, and speak their native indigenous languages instead.¹³ Bilingual education in Panama is limited, as are teachers able to speak these indigenous languages.¹⁴ When bilingual education is provided, it often suffers from a lack of input from the indigenous community, resulting in an inaccurate presentation by the educators of indigenous language and culture.¹⁵

8. Panama has made some efforts to improve indigenous children's access to education. These efforts need to be maintained, improved, and increased.

II. DEGRADATION OF ENVIRONMENTAL QUALITY

9. The country of Panama is developing rapidly in both infrastructure and economy, especially with loans from institutions such as The World Bank. In addition to its economic resources, Panama is vastly rich in natural resources. Many of Panama's natural wonders remain preserved, since infrastructure has not yet been developed to facilitate tourism in remote parts of the country. However, the tourism industry in Panama is expanding quickly due to growing infrastructure. Panama is pursuing many

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

developmental projects that extend into environmentally protected parts of the country, some of which are also the ancestral land sites of Panama's indigenous groups.

10. The main danger to Panamanian indigenous peoples' rights to conservation and protection of their environment is the threat of ecosystem disruption due to development. Both construction and an increase in tourist access to indigenous lands and environment are products of development in Panama. Although the economies of indigenous communities will benefit from an increase in tourism, Panama must still give careful consideration to preserving its ecosystems and the indigenous peoples living within them before taking irrevocable action in the name of development. Panama has recognized this, and in some instances has partnered with environmental groups to develop a strategy to preserve Panama's environment and the rights of its indigenous peoples thereto, while simultaneously advancing Panama's infrastructure and economy.

Certain Protected Areas and Indigenous Inhabitants

11. The geography of Panama is divided into provinces. Comarcas are reserved to the indigenous groups of Panama pursuant to the Panamanian constitution.¹⁶ The Comarca Ngöbe-Buglé is partially within the province of Bocas del Toro, and is shared by the two distinct indigenous peoples of Ngöbe and Buglé.¹⁷ Communities of indigenous peoples in the province include the Ngöbe, Buglé, and Naso.¹⁸ The Ngöbe peoples have a population of 200,000, which is the greatest of all 7 indigenous groups in

¹⁶ Constitution of the Republic of Panama, art. 127.

¹⁷ Defensoria del Pueblo (hereinafter "Defensoria"), Interview (Jan. 7, 2010).

¹⁸ *Id.*

Panama.¹⁹ The Buglé and Naso peoples each have a peoples of 3,000.²⁰ These numbers are subject to change when Panama's 2010 census is completed.²¹

12. The environmentally protected lands encompassed by the Bocas del Toro Province include La Amistad National Park, Palo Seco Protected Woodland Area, the Bastimento Island National Park, and the San San Pond-Sak Wetland.²² The area is recognized as a United Nations Educational, Scientific, and Cultural Organization ("UNESCO") Biosphere Reserve and World Heritage Site.²³ The area is densely forested, with four species of mangroves, flooded coastal forests, and cloud and lowland forests.²⁴ There are an additional 180 plant species exclusive to Panama found only in the region.²⁵

13. On the northeastern coast of Panama the province of San Blas encompasses the Comarca Kuna Yala. The Comarca Kuna Yala comprises an archipelago of 365 islands and a strip of land stretching 373 kilometers along the northeastern coast of Panama.²⁶ There are a total of 49 Kuna Yala communities in the comarca, with 36

¹⁹ Defensoria, Interview (Jan. 7, 2010).

²⁰ *Id.*

²¹ *Id.*

²² CBD, Details-Panama, *Number and Extent of Protected Areas* (Feb. 21, 2010)

(<http://www.cbd.int/countries/profile.shtml?country=pa#status>).

²³ United Nations Educational, Scientific, and Cultural Organization (hereinafter "UNESCO"), *Latin American and the Caribbean*, Panama

([http://portal.unesco.org/science/en/ev.php-](http://portal.unesco.org/science/en/ev.php-URL_ID=5773&URL_DO=DO_TOPIC&URL_SECTION=201.html)

[URL_ID=5773&URL_DO=DO_TOPIC&URL_SECTION=201.html](http://portal.unesco.org/science/en/ev.php-URL_ID=5773&URL_DO=DO_TOPIC&URL_SECTION=201.html)); UNESCO, *World Heritage List* (<http://whc.unesco.org/en/list>).

²⁴ The Nature Conservancy, *La Amistad/Bocas del Toro: Helping Indigenous Peoples Create Networks* (Feb. 22, 2010)

(<http://www.nature.org/wherework/centralamerica/panama/work/art8692.html>).

²⁵ *Id.*

²⁶ Indigenous Peoples' Biocultural Climate Change Assessment Initiative (hereinafter "IPCCA"), *Fact Sheet Comarca Kuna de Yala, Panama* (Mar. 15, 2010)

(http://www.ipcca.net/module_02_03.php).

inhabiting the islands and 13 inhabiting the mainland.²⁷ In 2004 the peoples of Comarca Kuna Yala was 67,487 peoples.²⁸

The Development Projects

14. Article 8(j) of the Convention on Biological Diversity states each party shall “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application.” Despite this obligation, Panama has arguably suppressed, instead of “preserved” and “promoted”, the lifestyles of the Ngöbe, Buglé, and Naso during the development of Changuinola-75 (“Chan-75”) hydroelectric dam.

15. Chan-75 is being constructed on the Changuinola River. Construction is taking place in La Amistad Biosphere Reserve in the Bocas del Toro province. The project required government concession of 6,215 hectares of the Palo Seco protected forest to the construction company AES-Changuinola.²⁹ The dam will flood four Ngöbe communities and displace them from their homes, affecting approximately 1,000 peoples in the communities of Charco la Pava, Valle del Rey, Guayabal, and Changuinola Arriba.³⁰ An additional 4,000 Ngöbe people will be affected by the construction of the dam.³¹ Chan-75 is heralded by the Panamanian government as a sustainable form of electricity generation that can provide extensive benefits to the developing country as a

²⁷ *Id.*

²⁸ *Id.*

²⁹ Ellen Lutz, Human Rights Violations by the Government of Panama Directed Against Ngobe Indigenous Communities and Individuals in the Changuinola River Valley, Bocas del Toro, Panama: Petition to the Inter-American Commission on Human Rights, Cultural Survival and ACD (Mar. 7, 2008).

³⁰ Alianza para la Conservacion y el Desarrollo (hereinafter “ACD”), Panama is in Breach of its Obligations to Indigenous Peoples under the Convention on the Elimination of all Forms of Racial Discrimination, 5.

³¹ *Id.*

whole. Although the Panamanian government made a rational choice by implementing the dam, the indigenous peoples inhabiting Bocas del Toro have experienced, and will continue to experience, disparate impacts of the project from the rest of the country's peoples. Another disparity can be seen between the amount of compensation received by the indigenous groups and the burdens they must bear for the project.

16. Chan-75 is in the backyard of the Ngöbe, Buglé, and Naso. These groups will be permanently impacted by the environmental changes resulting from the finished project. Hydroelectric power plants adversely affect aquatic and streamside habitats, despite their reputation for being a clean and renewable source of energy. Dams block fish passage to spawning areas and impact stream flow through the diversion of water. Hydroelectric plants lower the amount of dissolved oxygen in the water to negatively impact water quality.³² From the government's perspective, the environmental consequences of the dam are outweighed by the benefits hydroelectric power generation will bring for the country's people as a whole. However, the consequences will not be outweighed for the indigenous communities of Bocas del Toro who must directly experience them, unless they are adequately compensated.

17. An additional impact of Chan-75 will on indigenous communities and their environment is the clearing of land for construction and new residential areas for the relocation of indigenous communities. In 2001 Panama received a loan from The World Bank in the amount of \$47.9 million to facilitate a land administration project.³³ The aims of the project were to improve land tenure security and "enhance natural resources

³² Environmental Literacy Council, Hydroelectric Power (Feb. 21, 2010) (<http://www.enviroliteracy.org/article.php/59.html>).

³³ The World Bank, Projects and Operations, Panama Land Administration Project (<http://web.worldbank.org/external/projects/main?pagePK=64312881&piPK=64302848&theSitePK=40941&Projectid=P050595>).

conservation through the consolidation of the National System of Protected Areas and indigenous peoples' territories.”³⁴ However, the problem of deforestation and protection of rare species remains an issue despite funding from The World Bank to conserve natural resources.³⁵

Indigenous Water Use Rights

18. In conjunction with Nature Conservancy Panama (“Conservancy”), the government of Panama has begun a program to compensate indigenous peoples for water use by outsiders of the community during development. Development companies use the lands, labor, and watersheds of the indigenous communities, sometimes providing in return only 1% of profits.³⁶ The State of Panama has signed a Memorandum of Understanding (“MOU”) with the Nature Conservancy to advance environmental conservation under its obligation to the Convention on Biological Diversity (“CBD”). Pursuant to the MOU, the Conservancy is also working to “develop payments for environmental services by creating water use fees, where private sector industries dependent on the region’s watersheds make ‘environmental services payments’ that support community development and natural resources management.”³⁷ The Conservancy’s efforts, facilitated by the Panamanian government, could provide adequate compensation to indigenous communities for water usage by developers. This

³⁴ The World Bank, Projects and Operations, Panama Land Administration Project (<http://web.worldbank.org/external/projects/main?pagePK=64312881&piPK=64302848&theSitePK=40941&Projectid=P050595>).

³⁵ The Nature Conservancy, La Amistad/Bocas del Toro: Helping Indigenous Peoples Create Networks (Feb. 22, 2010) (<http://www.nature.org/wherewework/centralamerica/panama/work/art8692.html>).

³⁶ Defensoria, Interview (Jan. 7, 2010).

³⁷ The Nature Conservancy, La Amistad/Bocas del Toro: Helping Indigenous Peoples Create Networks (Feb. 22, 2010) (<http://www.nature.org/wherewework/centralamerica/panama/work/art8692.html>).

positive action by the Panamanian government is noteworthy in evaluating Panama's compliance with its international obligations.

Solid Waste Disposal System

19. Article 10 of the United Nations Framework on Climate Change and Kyoto Protocol states all parties shall “[f]ormulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change and measures to facilitate adequate adaptation to climate change . . . [s]uch programmes would, *inter alia*, concern . . . waste management[.]” Furthermore, Articles 21 and 29 of the Declaration on the Rights of Indigenous Peoples provide evidence of customary international law. They state, respectively, “[i]ndigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including in the area of . . . sanitation [and] health,” and, “[i]ndigenous 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 programs for indigenous peoples for such conservation and protection, without discrimination.”

20. The waste disposal system in Panama is not organized or efficient. Law 2 of Jan. 7, 1992 creates the regulatory and institutional framework for Panama's water supply and sanitation sector, and assigns regulatory authority to the Ministry of Health. However, waste management in Panama is decentralized, and the responsibility of municipalities.³⁸ Additionally, there is no official recycling program instated in the

³⁸ Association for the Advancement of New Development Alternatives (hereinafter “APRONAD”), *The Solid Waste Management in Panama* (2001).

country. Instead, an underground network of street and landfill scavengers sells recovered recyclable materials to private companies for continued use.³⁹

21. Panama's environmental agency, Autoridad Nacional del Ambiente ("ANAM"), has implemented the National Strategy of the Environment: Environmental Management for Sustainable Development 2008-2012. The Strategy recognizes an increase in drinking water contamination and an increase in solid waste due to boosts in the economy and peoples. Panama's recognition of these issues is a positive step, and this section seeks to illustrate the benefits that the country can enjoy upon implementation of a centralized waste management system.

22. Implementing an organized solid waste disposal system and recycling program could benefit Panama in 3 instances, literally creating economic value out of garbage. First, implementing a centralized framework for solid waste management and recycling, as well as its regulation, would create many jobs for Panamanians. Second, reusing recyclable materials would free-up landfill space, and decrease the pollution and contamination that can result from excess waste. Third, implementing efficient waste management and recycling programs in tourist areas would conserve the beauty of those areas and ensure economic gains from tourism into the future.

Increased Tourism and Trash in San Blas

23. The San Blas islands in the Comarca Kuna Yala, provide an illustration of the third point. Tourism among resident Panamanians to the San Blas islands has increased drastically in the last two years. This increase is due to the recent pavement of the

³⁹ Richard Linowes and Mollie Brown Hupert, "The Tropical Waste Dilemma: waste management in Panama," *International Journal of Emerging Markets*, Vol. 1 No. 3, 231-232 (2006) (<http://www.emeraldinsight.com/Insight/ViewContentServlet?Filename=/published/emeraldfulltextarticle/pdf/3010010303.pdf>).

perilous road that leads to the Panamanian shoreline of the Caribbean Sea, and thereby the San Blas islands. Before the pavement of the rollercoaster-like roads, the vehicles were pulled to the top of the steep hills by chains while passengers were required to exit the vehicles and travel the hills by foot.⁴⁰ Panamanians have taken advantage of the faster and somewhat safer travel to San Blas islands, but not necessarily international travelers.⁴¹

24. A local Kuna Yala member stated on the issue of tourism that “the economy of Kuna Yala has benefited, but the environment has not.”⁴² The problem of solid waste disposal is becoming a real issue for the Kuna Yala, since the islands are very small and there is not space for solid waste disposal. The Kuna Yala send their cans to Colombia for recycling and burn their paper trash, but have no way of recycling or otherwise managing the excess plastic refuse. Additionally, some trash generated by tourists gets discarded in the ocean and washes up to the island shores. Some Kuna Yala members have found new and imaginative uses for the plastic bottles, such as lining the exterior walls of huts or children’s arts and crafts projects. However, there is too much trash for the Kuna Yala to put to beneficial use without the help of the government. While the Kuna Yala enjoy a boost to their economy with heightened tourism, it is a wash because the return includes a deteriorated environment that the Kuna Yala must remediate.

Climate Change in San Blas

25. The increased amount of refuse on the islands only exacerbates the preexisting stress brought by climate change. The effects of climate change are observable on the islands of San Blas. Rising sea levels are an everyday threat to the island-dwelling Kuna

⁴⁰ Interview with Kuna Member (Jan. 9, 2010).

⁴¹ Interview with Kuna Guide (Jan. 9, 2010).

⁴² *Id.*

Yala, and they fear their island-homelands will soon be engulfed by the ocean.⁴³ The Comarca Kuna Yala extends into the mainland, but there is not enough land capacity to facilitate immigration onto the mainland of all 36 island-dwelling communities.⁴⁴ This is because a lot of the mainland is dedicated to subsistence agriculture, on which all Kuna Yala communities depend for their livelihood.⁴⁵ Every Kuna Yala community has territory on the comarca mainland where crops are grown for consumption.⁴⁶ Climate change thereby creates a “catch-22” for the Kuna Yala peoples’ survival, making it inevitable that one day the peoples must choose between using the mainland for subsistence agriculture or housing. However, it is not feasible for them to choose, since both choices are integral to survival.

Conclusion

26. Development enables the enrichment of Panamanian society, but the consequences of that enrichment should not outweigh the benefits. As a developing country, Panama should seriously consider and mitigate the adverse impacts major development projects have on indigenous peoples and their environment. Indigenous communities should not be subjected to experiencing disparate burdens of development without an equitable return. Similarly, Panama should implement a centralized and more efficient waste management system to create jobs, benefit from the reuse of recyclable materials, and preserve the beauty of its natural environment.

III. LAND INFRINGEMENTS

The Problem

⁴³ Comarca Kuna Yala, Interview (Jan. 9, 2010).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

27. The problems indigenous peoples face regarding the protection of their lands are well documented. Noting the early development of laws regarding indigenous lands in Panama, Stephanie Wickman stated that, “[e]arly legislation regarding indigenous peoples 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.”⁴⁷ This policy has been driven by the desire to promote international development.⁴⁸ The problem of land infringements is not just a problem from the past, but is something indigenous peoples are facing constantly today. While indigenous peoples who live on a comarca have some legal independence for their lands, they are still constantly dealing with infringements by outsiders. Worse is the situation of indigenous peoples off the comarca, who rarely have their collective land rights enforced by the government.⁴⁹ This section will briefly discuss the land infringement problems faced in three indigenous Panamanian communities.

The Madungandi Peoples

28. In the 1970’s, the World Bank provided \$42 million to build the Bayano Dam that flooded 350 kilometers of land, forcing 2,500 indigenous peoples, mostly Madungandi, off their lands.⁵⁰ These were traditional lands of the Madungandi people,

⁴⁷ Stephanie Wickstrom, *The Politics of Development in Indigenous Panama*, 30 LATIN AMERICAN

PERSPECTIVES 43, 45 (2003), available at <http://www.lap.sagepub.org>.

⁴⁸ *Id.* at 44.

⁴⁹ Roger Plant and Soren Hvalkof, *Land Titling and Indigenous Peoples*, Inter-American Development Bank Technical Paper, 2001, <http://www.iadb.org/sds/doc/IND-109E.pdf> (“Yet, there is no jurisprudence to cover the claims of indigenous groups outside the *comarcas*. Indigenous organizations are proposing special legislation to recognize the collective rights of these indigenous groups over the lands they occupied.”).

⁵⁰ Hector Huertas and Bonerge Pacheco, *The Bayano Hydroelectric Dam in Panama*, Aug. 30, 2002, <http://www.nadir.org/nadir/initiativ/aggp/free/imf/panama/bayano.htm>.

and had been protected by statute for the Madungandi for decades.⁵¹ The peoples were removed to their current comarca, which is smaller than the previous territory and of an inferior quality, while being located at a higher elevation.⁵² Many peoples became sick from decomposing vegetation, and the culture was weakened by the removal from traditional locations.⁵³ The Madungandi were promised compensation by the government of General Torrijos (1968-1981), but only to those who held titled land. Holding title in this particular indigenous community is generally not possible due to the collective land-holding traditions of the Madungandi. This has led the Madungandi to go uncompensated, in contravention of international law (discussed below), for over 30 years.

29. Equally problematic, peasant farmers, called Colonos, illegally settle on the Madungandi lands thanks to the extension of the Pan-American Highway which made access to the remote comarca less of an obstacle.⁵⁴ The Colonos cut down forests, exhaust land fertility, and then frequently sell land to cattle ranchers.⁵⁵ The effect of these illegal settlements of Madungandi land is to limit access to already limited lands, and reduce access to traditional ways of living. These problems have led to violent protests by the Madungandi people that have involved tear gassings and multiple arrests of Madungandi people.⁵⁶

⁵¹ No. 18 art. 1, *Gaceta Oficial* 1934.

⁵² Report 58/09, Petition 12.354, Admissibility, Kuna of Madungandi and Embera of Bayano Indigenous Peoples and their Members, (Apr. 21, 2009), *available at* <http://www.cidh.oas.org/annualrep/2009eng/Panama12354eng.htm>

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Eric Jackson, *Violence at Kuna Land Protest in Madugandi*, *The Panama News*, Nov. 4-17, 2007, *available at* http://www.thepanamanews.com/pn/v_13/issue_21/news_02.html.

⁵⁶ *See Id.*

The Naso Peoples

30. The Naso peoples have traditionally inhabited parts of western Panama. In 1914, much of their land was given to the United Fruit Company, then later to the Ganadera Bocas, a ranching company.⁵⁷ The Naso are a relatively small community numbering only about 3,500 and inhabit 11 villages.⁵⁸ Today, many Naso still live on the cattle ranch that only arguably has legal title to the land.⁵⁹ Twice in 2009 the Ganadera Bocas Company, along with support from local police, tore down Naso housing, leaving hundreds of indigenous peoples homeless.⁶⁰ The Naso people frequently face discrimination like this. It is, however, just the beginning of their problems. The Bonyic Dam is a \$50 million development project that is underway in the Naso's region.⁶¹ While certain concessions are being offered to the Naso, like clinics and scholarships, the development will not only encroach further on Naso lands, but will undermine their traditional way of life.⁶²

31. Being one of two indigenous communities in Panama not to have been given a semi-independent comarca, the Naso are without recourse to protect their land claims. The Panamanian National Assembly rejected a law to create a comarca for the Naso

⁵⁷ Caroline Mayhew and Osvaldo Jordan, *Panama is in Breach of its Obligations to Indigenous Peoples Under the Convention on the Elimination of All Forms of Racial Discrimination*, Shadow Report to the U.N. Committee on the Elimination of Racial Discrimination, On the Occasion of its Consideration of the 15th to 20th Periodic Reports of Panama at 9.

⁵⁸ *Caribbean Indigenous Leaders Vow to Help the Naso Tribe of Panama*, Pan-Tribal Confederacy of Indigenous Tribal Nations, Apr. 17, 2009, http://www.pantribalconfederacy.com/confederacy/News/pdf/naso_tribe.pdf.

⁵⁹ Karis McLaughlin and Martin Mowforth, *For the Second Time This Year the Naso Have Their Houses Destroyed to Make Way for a Cattle Ranching Company*, Environmental Network for Central America, Dec. 2009, <http://www.enca.org.uk/documents/ENCAnewsletterDec09.pdf>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

peoples in June of 2004.⁶³ Instead, the government passed Law 72 in 2008 which approved an organic charter for the Corregimiento Comarcal Naso.⁶⁴ This would not give the Naso the same rights that other indigenous communities have been given. It would place them under the authority of a mayor who would be appointed by the Mayor of Changuinola, an area where the Naso are a minority.⁶⁵ The Naso have rejected this solution on grounds that they are being discriminated against in relation to other indigenous communities, because it does not represent their traditional leadership structure, and because they were not allowed to participate in the drafting of the law.⁶⁶

The Embera-Wounaan Peoples

32. The Embera-Wounaan people are actually two distinct groups who share a bifurcated comarca that is mostly located in the remote Darien region of eastern Panama. The total peoples of the comarca is approximately 30,000 peoples. The Embera-Wounaan have also had numerous problems in relation to their land. For starters, 500 Embera face the same problem arising from the Bayano Dam as the problem discussed above that are faced by the Madungandi.⁶⁷ These people were removed from their territories in the 1970's and still live without compensation for the removal.

33. Furthermore, the Embera-Wounaan have faced numerous land infringement problems. In the 1970's, the Torrijo's regime promised a large swath of land to the Embera community, which was later rescinded under General Noriega.⁶⁸ Since this time,

⁶³ See *Supra* note 12, at 10.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See *Supra* note 6.

⁶⁸ Jose Ponce and Eric Jackson, *Embera Communities Block the Road to Fend Off a Land Invasion*, The Panama News, June 2, 2009, http://www.thepanamanews.com/pn/v_15/issue_10/news_01.html

Colonos have constantly invaded indigenous lands both on and off the comarca, which has led to protests that often turn violent.⁶⁹

Affirmative Obligation to Protect Indigenous Lands

34. The Panamanian government is under an affirmative obligation, both through domestic and international law, to protect indigenous lands. The Panamanian Constitution in Article 4 declares that Panama will abide by the rules of international law.⁷⁰ This statement binds Panama not only to the various treaties that it has signed in relation to indigenous peoples, but also to any customary law on the subject.

35. Panama voted to approve the Declaration on the Rights of Indigenous Peoples (DRIP).⁷¹ While this is only a declaration, and is therefore not binding international law, the fact that it passed the U.N. General Assembly with such a strong vote of support (143 votes in support, 11 abstentions, and 4 against which included Australia, Canada, New Zealand, and the United States⁷²), has strong persuasive value. Furthermore, the fact that Panama itself voted in favor of DRIP should provide further incentive for the Panamanian government to abide by its text.

36. Many articles within DRIP in some way touch on the issues related to land infringements. Article 8 protects indigenous peoples against forced assimilation or cultural destruction, which includes dispossession from indigenous lands.⁷³ Article 10

⁶⁹ *Id.*, See also Arcadio Bonilla, *Indigenas y Campesinos se Enfrentan por la Tierra*, Mar. 3, 2006,

<http://mensual.prensa.com/mensual/contenido/2006/03/03/hoy/nacionales/519496.html>.

⁷⁰ CONST. POL. PAN. [Constitution] Art 4 (1972).

⁷¹ Press Release, U.N.G.A, *General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major step Forward' Towards Human Rights for All, Says President*, U.N. Doc. GA/10612, (Sep. 13, 2007).

⁷² *Id.*

⁷³ UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, 2 October*

requires consent for removal from lands, and requires compensation when removal does occur.⁷⁴ Article 18 requires that indigenous peoples have the right to participate in decision-making when those decisions affect their rights.⁷⁵ Article 19 requires states to gain informed consent before passing legislation that affects indigenous peoples.⁷⁶ Most important to this discussion is Article 26 which states,

“Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. . . . 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. . . . States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”⁷⁷

Finally, Articles 28 and 29 give indigenous peoples the right to redress when their lands and resources have been taken, and the right to conserve their environmental integrity.⁷⁸

37. The International Labor Organization, Indigenous and Tribal Peoples Convention of 1957 (C107) is binding on Panama due to its ratification of the Convention. Article 11 of C107 guarantees indigenous peoples the right of ownership,

2007, A/RES/61/295, art. 8, *available at* <http://www.unhcr.org/refworld/docid/471355a82.html>.

⁷⁴ *Id.* at art. 10.

⁷⁵ *Id.* at art. 18.

⁷⁶ *Id.* at art. 19.

⁷⁷ *Id.* at art. 26.

⁷⁸ *Id.* at art. 28-29.

either collectively or as individuals, of lands traditionally occupied by those peoples.⁷⁹ Article 12 bans removal from lands without consent unless there is an exceptional circumstance.⁸⁰ Even if indigenous peoples are removed, they are to be given lands of equal quality that is suitable for present and future development needs, and compensation must be made for any taking.⁸¹ A follow-up to this convention was written in 1989 (C169). This convention has many similar articles that restrict governments from infringing on indigenous lands, and requires compensation for infringements that take place.⁸² While Panama is not a party to this convention, most South and Central American nations are. Considering these are countries with high indigenous peoples, it is reasonable to say that this convention should have persuasive value.

38. Panama has ratified the International Covenant on Civil and Political Rights (ICCPR). The ICCPR has numerous articles designed to prevent discrimination against ethnic groups, provide for equal protection of law, and to protect the free disposal of property. In making this point, one report submitted on Panama to the U.N. Human Rights Committee stated, “Articles 1, 2(1), 2(2), 2(3), 6(1), 26, and 27 by failing to grant *comarca* territorial status to other indigenous peoples and to adopt measures to enable indigenous peoples to fully enjoy their interdependent and indivisible civil, political,

⁷⁹ International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention, C107*, 26 June 1957, C107, art. 11, available at <http://www.unhcr.org/refworld/docid/3ddb66804.html>.

⁸⁰ *Id.* at art. 12.

⁸¹ *Id.*

⁸² See International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention, C169*, 27 June 1989, C169, available at <http://www.unhcr.org/refworld/docid/3ddb6d514.html>.

cultural, economic, and social, cultural, civil, and political rights, in full equality and without discrimination.”⁸³

39. The Convention on the Elimination of All Forms of Racial Discrimination (ICERD) is also binding law that is relevant to issues of land infringement. The Committee on the Elimination of Racial Discrimination made clear that land infringements of indigenous peoples are of primary concern to it through General Recommendation 23 in which it stated, “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.”⁸⁴ Article 5 of the Convention provides all persons “the right to own property alone as well as in association with others.”⁸⁵ The ICERD committee admonished Panama, stating that, “In the light of article 5 of the Convention, it is noted with concern that the issue of land rights of indigenous peoples has remained unsolved in a great majority of cases. . . . The Committee strongly recommends that the State party actively

⁸³Panama Breached its Obligations Under the International Covenant on Civil and Political Rights to Protect the Rights of its Indigenous Peoples, Submitted to the United Nations Human Rights Committee on the Occasion of its Consideration of the Third Periodic Report of Panama Pursuant to Article 40 of the International Covenant on Civil and Political Rights, (Mar. 24, 2008) P. 38, <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/PIHRLPanama92.pdf>.

⁸⁴ Office of the High Commissioner for Human Rights CERD General Recommendation No. 23, (Aug. 18, 1997), *available at* http://www.bayefsky.com/general/cerd_genrecom_23.php.

⁸⁵ UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, art. 5, *available at* <http://www.unhcr.org/refworld/docid/3ae6b3940.html>.

pursue its current efforts to implement fully the right of indigenous peoples to own property and land.”⁸⁶

40. Panama also ratified the American Convention on Human Rights in 1978 (ACHR). The ACHR has a number of relevant articles relating to property, in particular Article 21, which protects the right to enjoyment of property and the requirement of compensation for taking of property. In interpreting the Convention, along with the American Declaration on the Rights and Duties of Man, the Inter-American Court of Human Rights made very clear that indigenous peoples have the right to collective ownership of traditional lands. The court stated in *Dann v. U.S.*,

[T]he Commission is of the view that the provisions of the American Declaration should be interpreted and applied in the context of indigenous petitioners with due regard to the particular principles of international human rights law governing the individual and collective interests of indigenous peoples. Particularly pertinent provisions of the Declaration in this respect include Article II (the right to equality under the law), Article XVIII (the right to a fair trial), and Article XXIII (the right to property). . . . [T]his approach includes the taking of special measures to ensure recognition of the particular and collective interest that indigenous peoples have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions of equality, and with fair compensation. The Commission wishes to emphasize that by interpreting the American Declaration so as to safeguard the integrity, livelihood and culture of indigenous peoples through the effective

⁸⁶CERD, Concluding Observations of the Committee on the Elimination of Racial Discrimination: Panama. CERD/C/304/Add.32, (Apr. 23, 1997) *Available at* <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/CERD.C.304.Add.32.En?Opendocument>.

protection of their individual and collective human rights, the Commission is respecting the very purposes underlying the Declaration which, as expressed in its Preamble, include recognition that “[s]ince culture is the highest social and historical expression of that spiritual development, it is the duty of man to preserve, practice and foster culture by every means within his power.”⁸⁷

41. If the Court did not make their point clear enough in *Dann*, they certainly did so in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* in 2001. In this case the Court affirmatively stated that indigenous peoples have a right to claim ownership of traditional lands, and to do so in a communal fashion.⁸⁸

42. Panamanian domestic law also requires that the government take certain protective actions regarding indigenous lands. Article 17 of the Constitution states that the government must protect the property of its citizens.⁸⁹ While this does not speak directly to the indigenous peoples, it is inclusive of all citizens, and therefore, any failure by the government to protect indigenous property fails under Article 17. More importantly, however, Article 127 speaks directly to the rights of indigenous peoples. Article 127 guarantees indigenous peoples necessary lands and collective ownership sufficient to support their economic and social welfare.⁹⁰ This article provides the strongest legal documentation of Panama's affirmative obligation to protect indigenous property. Law 41, passed in 1998, is also important for indigenous peoples in relation to their right to the resources on their lands. This law guarantees they have access to natural

⁸⁷ *Dann v. U.S.*, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Serv.L/V/II.117, doc. 5 rev. P 131 (2002) *available at* <http://hrlibrary.ngo.ru/cases/75-02a.html>.

⁸⁸ *Mayagna (Sumo) Awas Tingni Cmty. Case*, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

⁸⁹ CONST. POL. PAN. [Constitution] Art 17 (1972).

⁹⁰ CONST. POL. PAN. [Constitution] Art 127 (1972).

resources, including, e.g., forests and subsurface resources, mining, and that they be properly consulted and compensated for any infringement of this right.⁹¹

Recommendations

43. When looking at the totality of both Panamanian domestic law and international law on the subject of indigenous land rights, it becomes clear that Panama has an affirmative duty to protect traditional lands of indigenous peoples, and compensate indigenous peoples when land has been taken. In light of this, we recommend the following be done as corrective actions for the various wrongs to the Panamanian indigenous communities:

- Pass legislation providing a comarca for the Naso people.
- Assist in enforcing laws that restrict non-indigenous settlements on comarca land.
- Create a dispute resolution process for indigenous persons to adjudicate land takings.
- Compensate the Madungandi for being forced from their traditional lands. The compensation should cover the removal from the lands, compensate for the lower quality of lands, and include interest for the nearly 40 years passed without compensation.
- Compensate Embera who were removed from traditional lands without compensation.
- Implement a titling and recognition plan that proactively recognizes traditional lands.

IV. RIGHT TO HEALTH

International Standards

⁹¹ Law 41 *Gaceta Oficial* 1998.

45. Panama is a party to multiple International Treaties that address and impose obligations upon the state concerning the right to health. Panama ratified the International Covenant on Economic, Social, and Cultural Rights in 1977.⁹² Article 12 of the ICESCR imposes an obligation upon the Panamanian government to recognize the right of its peoples to the highest attainable standards of health.⁹³ Through Article 12 of the ICESCR, the government is also obligated to provide conditions ensuring access to medical care, steps to prevent disease, and to reduce infant mortality.⁹⁴ Panama is also a party to the International Covenant on Civil and Political Rights. Ratified in 1977, the ICCPR requires state parties to guarantee every human being the inherent right to life.⁹⁵ In addition, Article 25 of the Universal Declaration of Human Rights states that all peoples have a right to a standard of living adequate for the health and wellbeing of himself and his family.⁹⁶

46. Additionally, Panama has voted to approve the Universal Declaration on the Rights of Indigenous Peoples (“DRIP”). Although this instrument is not binding, it nevertheless provides a guideline for governments and includes rights that should be afforded their indigenous peoples. Article 24 of DRIP states that indigenous groups have the right to traditional medicines and health practices, and have a right to access all health services provided by the state.⁹⁷

⁹² *International Covenant on Social, Economic, and Cultural Rights* (Ratified 1977) (http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en)

⁹³ *International Covenant on Social, Economic, and Cultural Rights*. (<http://www2.ohchr.org/english/law/cescr.htm>)

⁹⁴ Id

⁹⁵ *International Covenant on Civil and Political Rights* (Ratified 1977) (<http://www.hrcr.org/docs/Civil&Political/intlcivpol.html>)

⁹⁶ *Universal Declaration of Human Rights* (<http://www.un.org/en/documents/udhr/>)

⁹⁷ *UN Declaration on the Rights of Indigenous Peoples*. (<http://www.un.org/esa/socdev/unpfii/en/drip.html>)

Domestic Undertakings

47. The government of Panama provides its citizens with one of the most extensive healthcare systems in Latin America. Panama's health expenditure is 8.4% of GDP, making it one of the highest spending countries on healthcare in Latin America.⁹⁸ However this system is not reaching the rural areas of Panama, and therefore does not afford the indigenous peoples with the healthcare required by international law. The Panamanian government has taken active steps to provide adequate healthcare to its citizens, primarily through the country's constitution and legislation. Chapter VI of the Panamanian constitution states that it is the obligation of the government to ensure the health of the peoples and to develop national policies ensuring optimal nutrition and combating of disease.⁹⁹ Likewise, Panama has enacted legislation, specifically Law 4376, incorporating traditional practices into the healthcare system. Although Panamanian law provides protections and obligations, the indigenous communities of Panama are still at a disadvantage when it comes to healthcare due to a lack in access, a lack in cultural understanding, and extreme poverty among the indigenous peoples of Panama.

Lack of Access

48. The comarcas in which indigenous peoples live remain isolated from the urban centers of Panama. About 82 % of Panama's indigenous peoples live in rural areas of the country.¹⁰⁰ Because these areas are remote and tend to be long distances from urban centers, access to healthcare is scarce. Panama's indigenous peoples are extremely dispersed across geographically limiting areas of the country, therefore making it more

⁹⁸ WHO *Country Cooperation Strategy at a Glance*. (www.who.int/countries/pan/en/)

⁹⁹ Constitution of Panama

¹⁰⁰ *Social Assessment and Indigenous Peoples Plan*

difficult to provide equal access to healthcare.¹⁰¹ Particularly, the Nobe-Bugle and Embera comarcas have very little road access. Roads that are available are in very poor condition and are highly weather dependent.¹⁰² Likewise, the comarcas are located prohibitively far distances from the nearest health centers. Often, individuals must walk for hours or days to reach the nearest health facilities.¹⁰³

Use of Traditional Medicine and Practices

49. Another important factor that must be addressed is the use of traditional medicine and healthcare practices. While access to healthcare is scarce, many of the individuals that can reach health facilities choose not to due to a lack in understanding of traditional health practices.¹⁰⁴ Many of the customs and practices involving administration of medicine, childbirth, and treatment of illness are very different from that of developed countries. Because of this there is a perceived lack of understanding and lack of respect for the use of the various practices causing individuals from the indigenous communities to avoid seeking healthcare at state health facilities.¹⁰⁵ Many from the indigenous communities report that they would seek state sponsored healthcare if traditional notions and practices were respected.¹⁰⁶ The Panamanian government is attempting to combat this problem through the training of traditional birth attendants.¹⁰⁷ Panama enacted Law 4376 in 1999 to incorporate of traditional medicine into primary healthcare. This includes incorporating birth attendants into the healthcare system and researching traditionally used medicinal plants, however Law 4376 yet to be

¹⁰¹ Aguilar, Renato *Panama: Indigenous Peoples. Socio Economic and Demographic Characteristics Key Social Policy Issues to alleviate their poverty.*

¹⁰² Id.

¹⁰³ Id.

¹⁰⁴ Id.

¹⁰⁵ Id.

¹⁰⁶ Id.

¹⁰⁷ <http://apps.who.int/medicinedocs/fr/d/Jh2943e/5.16.html#Jh2943e.5.16>

implemented effectively.¹⁰⁸ In addition, with regards to traditional medicine, a primary concern of many of the indigenous communities is the preservation of traditional medicinal plants.¹⁰⁹ Much of the land within the comarcas, particularly in the San Blas area, is being sold to developers without the consent of the communities by the Panamanian government. Consequently, many of the medicinal plants used to treat individuals within the community are being destroyed, causing serious concern among the community physicians.¹¹⁰

Poverty

50. One of the main factors that contribute to a lack in healthcare is the tremendously high level of poverty among the indigenous peoples of Panama. Over 80% of Panama's indigenous peoples live in poverty and over 50% live in extreme poverty.¹¹¹ This creates a lack in nutrition, a lack in ability to access healthcare facilities, and a lack in education on preventative healthcare. Malnutrition among indigenous children is just under 60% as compared to only 16% among non-indigenous children.¹¹² In order to combat this Panama has implemented the *Red de Oportunidades* program. Individuals who live below the poverty line qualify for this government cash transfer program. In order to receive cash transfers the program requires that pregnant women and children of recipients use necessary health services and attend regular schooling.¹¹³ All individuals within the comarcas qualify for this program due to the fact that over 90% of the peoples within the comarcas are living below the poverty line.¹¹⁴ In other words these individuals

¹⁰⁸ <http://apps.who.int/medicinedocs/fr/d/Jh2943e/5.16.html#Jh2943e.5.16>

¹⁰⁹ Interview with Kuna

¹¹⁰ Interview with Kuna

¹¹¹ www.ruralpovertyportal.org/web/guest/country/home/tags/panama

¹¹² Id.

¹¹³ *Social Assessment and Indigenous Peoples Plan*

¹¹⁴ Id.

are earning less than one dollar per day.¹¹⁵ Likewise, the World Bank distributes money to the government of Panama for development funding. Much of this funding is to be used to provide food for those living below poverty levels, however often funding is used elsewhere and when food is distributed to the indigenous peoples it is frequently spoiled causing an increase in malnutrition.¹¹⁶

51. The disparity in healthcare among the indigenous peoples of Panama creates a multitude of health concerns within the country. Infant mortality rates among the indigenous peoples are at the levels of the national rates in the 1970's.¹¹⁷ Malnutrition among children is rampant and healthcare facilities are virtually inaccessible to those that choose to seek them. Although the government of Panama has been implementing various programs to combat the disparities present in the healthcare system, more must be done to comply with the international obligations that Panama has chosen freely to undertake. It would greatly benefit the indigenous peoples of Panama if the government were to ratify ILO 169. ILO 169 concerns indigenous peoples in independent states and guarantees certain rights and protections. In particular ILO 169 requires that states “ensure that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the peoples.”¹¹⁸ While the government of Panama has shown great resistance to becoming a party to ILO 169, there is tremendous hope and support for ratification among the indigenous peoples of Panama.¹¹⁹

V. PRISONERS RIGHTS

¹¹⁵ Cultural Action NGO Interview, Panama

¹¹⁶ Cultural Action NGO, Panama

¹¹⁷ http://www.paho.org/english/dd/ais/cp_591.htm

¹¹⁸ *ILO 169* (<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>)

¹¹⁹ Interview with Kuna, Panama.

Managerial Structure

52. The Dirección General del Sistema Penitenciario (DGSP), within the Ministry of Government and Justice, a division within the executive branch, is responsible for planning, organizing, directing, implementing and monitoring the national prison system.¹²⁰ This includes stand-alone prisons and those found within police stations, a total of 18 locations. The National Police are a division of the Panamanian Public Forces, also under the executive.¹²¹ The National Police are officially responsible for the external security of the prisons, but often provide internal security because there is a shortage of civilian guards.¹²² The Ombudsman's Office is the domestic institution responsible for investigating alleged human rights violations. Established in 1997, it is an independent institution, but only has jurisdiction over alleged violations by the executive branch. After investigating alleged violations the office issues "results and criticisms" but has no authority to assess penalties.¹²³ The information gathered is sent back to the executive branch to punish violations; a circular and possibly fruitless

¹²⁰ Law No. 55 of July 30, 2003, *Que reorganiza el Sistema Penitenciario*, Official Gazette of the Republic of Panama, No. 24,857, Aug. 1, 2003, art. 19 [hereinafter Law 55].

¹²¹ Immigration and Refugee Bd. of Canada, *Panama: 1) Current situation since departure of Noriega 2) Information on the dismantling of the army and the "civil militia" 3) Is there still a risk of persecution?*, June 1, 1990, available at: <http://www.unhcr.org/refworld/docid/3ae6ab6a50.html> [accessed March 17, 2010].

¹²² Mayhle, Time & Marioa Luisa Romero, *Del Porton Para Aca Se Acaban Los Derechos Humanos: Injusticia y Desigualdad en las Carceles Panamenas*, Clinica de Derechos Humanos, Programa de Derechos Humanos, Facultad de Derecho de la Universidad de Harvard, 85, <http://www2.ohchr.org/english/bodies/hrc/docs/ngos/HarvardClinicPanamaprison.pdf> [accessed Mar., 17, 2010].

¹²³ Law No. 7 of Feb. 5, 1997, "Por la Cual Se Crea la Defensoria del Pueblo", art. 2, Official Gazette of the Republic of Panama, No. 23,221, Feb. 6, 1997.

process.¹²⁴ Any large-scale violations by the executive could see little accountability in the domestic process.

International Standards

53. Prisoners have the right to adequate standards of living and the most attainable standards of physical and mental health.¹²⁵ This includes accommodation conditions with adequate health care, ventilation, floor space, bedding, and room temperatures.¹²⁶ International standards also call for the segregation of prisoners not yet convicted and awaiting trial, and the detention of these individuals is to be used by courts sparingly and “not the general rule”.¹²⁷ Additionally, prisoners are to be free from acts of torture or

¹²⁴ Ricardo Julio Vargas, Defensoria Del Pueblo de la Republica de Panama, Oficina de Proteccion de los Derechos Humanos de las Personas Privadas de Libertad, *Informe Especial relative a las denuncias sobre supuestos Actos de Tortura, Tratos Crueles, Inhumanos y Degradantes en los Centros Penitenciarios de Panama (2008)*, available at: <http://www.defensoriadelpueblo.gob.pa/uploads/subsectionpdf/710.pdf> [accessed Mar. 17, 2010].

¹²⁵ Universal Declaration of Human Rights, art. 25, Dec. 10, 1948, available at: http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf [accessed Mar. 17, 2010] [hereinafter Universal Declaration]; International Covenant on Economic, Social, and Cultural Rights, art. 11-12, Jan. 3, 1976, available at: <http://www2.ohchr.org/english/law/pdf/cescr.pdf> [accessed Mar. 17, 2010] [hereinafter Covenant on Social Rights].

¹²⁶ United Nations, Economic and Social Council, The Standard Minimum Rules for the Treatment of Prisoners, Rules 9, 10, 11, 12, as adopted by the First Congress of the United Nations on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663C on July 31, 1957, and 2076 on May 13, 1977, available at: <http://www2.ohchr.org/english/law/pdf/treatmentprisoners.pdf> [accessed Mar. 17, 2010] [hereinafter Standard Minimum Rules].

¹²⁷ Universal Declaration, *supra* note 6, art. 9; International Covenant on Civil and Political Rights, United Nations General Assembly Resolution 2200A, art. 9-10, Dec. 16, 1966, available at: <http://www2.ohchr.org/english/law/pdf/ccpr.pdf> [accessed Mar. 17, 2010] [hereinafter Covenant on Political Rights]; United Nations, Standard Minimum Rules for non-custodial Measures (The Tokyo Rules), Adopted by General Assembly Resolution 45/110, art. 6, Dec. 14, 1990, available at: <http://www2.ohchr.org/english/law/pdf/tokyorules.pdf> [accessed Mar. 17, 2010] [hereinafter Tokyo Rules]; Standard Minimum Rules, *supra* note 7, art. 8; Human Rights Committee, General Comment 21 on the rights of persons deprived of their liberty, U.N. Cog. HRI/GEN/1/Rev.7 at 153 para 9 (2004).

cruel, inhuman or degrading treatment.¹²⁸ All of these rights must be enforced without a discriminatory purpose or effect.¹²⁹

Domestic Implementation

54. Panama's Constitution provides for the protection of health, security, and welfare.¹³⁰ It establishes a duty on Panama to ensure the health of the general peoples and individual rights to the preservation of physical, mental, and social welfare.¹³¹ There are many programs and plans cited by Panama to ensure health rights for the general peoples.¹³² Additionally, Act No. 55 of July 30, 2003, provides extensive guarantees for the health and living conditions of prisoners.¹³³ The Ministry of Health has the

¹²⁸ Universal Declaration, *supra* note 6, art. 5; American Convention on Human Rights, art. 5, Aug. 17, 1978, available at: <http://www.oas.org/juridico/english/treaties/b-32.html> [accessed Mar. 17, 2010] [hereinafter American Convention]; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, 13, United Nations General Assembly Resolution 39/46, June 25, 1987, available at: <http://www2.ohchr.org/english/law/pdf/cat.pdf> [accessed Mar. 17, 2010] [hereinafter Geneva Convention]; Organization of American States, Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1958, available at: <http://www.unhcr.org/refworld/docid/3ae6b3620.html> [accessed Apr. 3, 2010] [hereinafter Inter-American Convention]; Covenant on Political Rights, *supra* note 8, art. 7, 10; Standard Minimum Rules, *supra* note 7, rule 31; Basic Principles for the Treatment of Prisoners, Principles 1-8, United Nations General Assembly Resolution 45/111, Mar. 28, 1991, available at: <http://www.unhcr.org/refworld/docid/48abd5740.html> [accessed 3 April 2010].

¹²⁹ International Convention on the Elimination of All Forms of Racial Discrimination, art. 1, 5, Dec. 21, 1965, available at: <http://www.unhcr.org/refworld/docid/3ae6b3940.html> [accessed Apr. 3, 2010] [hereinafter Convention on Racial Discrimination].

¹³⁰ Constitution of the Republic of Panama, ch. 6 [hereinafter Constitution].

¹³¹ *Id.* at art. 106.

¹³² United Nations Economic and Social Council, *Implementation of the International Covenant on Economic, Social and Cultural Rights, Second Periodic Reports Submitted by State Parties under Articles 16 and 17 of the Covenant, Addendum, Panama*, 29-53, E/1990/6/Add.24, Mar. 31, 2000, available at: [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/66d3cc150fdb429c1256999005525e0/\\$FILE/G0041244.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/66d3cc150fdb429c1256999005525e0/$FILE/G0041244.pdf) [accessed Apr. 3, 2010] [hereinafter ICCPR Implementation].

¹³³ Law 55, *supra* note 1, arts. 5, 47, 62, 63.

responsibility to ensure the well-being of prisoners with regard to a wide range of medical services and operated through the prison clinics.¹³⁴ Law 55 also mandates that the living conditions be adequately maintained and that an effective system of custody and treatment be developed.¹³⁵ Other domestic laws reinforce all the standards above, address drug addiction issues, and call for the prisoners' equal access to healthcare as would be provided to the general public.¹³⁶ Domestic law also calls for a certain level of sanitation in all matters including water quality.¹³⁷

55. Law 55 stipulates that prisoners pending an investigation are to be separated from convicted inmates.¹³⁸ The judicial procedure code states that ‘...Detention pending investigation in prison establishments may be ordered only when all other measures are inadequate....’¹³⁹

56. The Constitution also places a duty on the state to protect the dignity of all peoples within the jurisdiction of Panama.¹⁴⁰ It specifically prohibits measures that

¹³⁴ *Id.* at art. 62-63.

¹³⁵ *Id.* at art. 47

¹³⁶ *Id.* at art. 95; Ministry of Government and Justice, Executive Order No. 939 of July 25, 2005, art. 282, “Que Reglamenta el Sistema Penitenciario” (“Reglamento de la Ley 55”), Official Gazette of the Republic of Panama, No. 25,368, Aug. 22, 2005; Law No. 3 of Jan. 5, 2000, art. 40, 41, Official Gazette of the Republic of Panama, Jan. 7, 2000; Law No. 18 of Sept. 22, 1982, Adopting the Criminal Code of the Republic of Panama, art. 112, 113, Official Gazette of the Republic of Panama, Oct. 6, 1982.

¹³⁷ Law No. 66 of Nov. 10, 1947, art. 1, “Por la cual se aprueba el Código Sanitario”, Official Gazette of the Republic of Panama, No. 10467, Dec. 6, 1947; Law No. 21 of Aug. 29, 1979, Amending art. 207 of the Sanitary Code, Official Gazette of the Republic of Panama, No. 18916, Sept. 25, 1979; Decree Law No. 35 of Sept. 22, 1966, “Para reglamentar el uso de las aguas,” art. 54, available at:

http://www.oas.org/usde/environmentlaw/waterlaw/documents/Panama-Ley_sobre_el_uso_de_las_Aguas_%281966%29.pdf [accessed Apr. 3, 2010]; Law No. 41 of July 1, 1998, “General de Ambiente de la Republica de Panama”, Official Gazette of the Republic of Panama, No. 23, 578, July 3, 1998.

¹³⁸ Law 55, *supra* note 1, art. 46.

¹³⁹ ICCPR Implementation, *supra* note 13, para. 111.

¹⁴⁰ Constitution, *supra* note 11, art. 17.

“impair the physical, mental or moral integrity of detainees.”¹⁴¹ Other laws call for a certain scope of behavior by the National Police, who are the majority of prison guards.¹⁴² This includes protecting the basic rights and freedoms of those within the jurisdiction of the state without discrimination.¹⁴³ They are explicitly prevented from “inflicting, instigating or tolerating acts of torture and other cruel inhuman or degrading treatment.”¹⁴⁴

57. The Convention on the Elimination of All Forms of Racial Discrimination, which mandates that all rights be enforced without discriminatory purpose or effect, is directly enforceable or justiciable in Panamanian courts.¹⁴⁵ The Panama Constitution also prohibits discrimination based on race.¹⁴⁶

58. Panama’s domestic legal framework, as enacted, complies with its international obligations. Conversely, their domestic legal framework, as enforced, does not rise to the same level of compliance to international obligations.

Indigenous Issues

59. Indigenous peoples are likely disproportionately represented among the prison peoples. The indigenous make up 10.5% of the general peoples.¹⁴⁷ Statistics on

¹⁴¹ *Id.* at art. 27.

¹⁴² Law No. 18 of June 3, 1997, Organic Law of the National Police, Official Gazette of the Republic of Panama, No. 23302, June 4, 1997.

¹⁴³ *Id.* at art. 2, 10.

¹⁴⁴ *Id.* at art. 18, 19.

¹⁴⁵ Environmental Advocacy Center and Human Rights Everywhere, Alternative Report on the implementation of Panama of the Convention on the Elimination of All Forms of Racial Discrimination, 4, (citing Law No. 49 of 1967), available at: http://www2.ohchr.org/english/odies/cerd/docs/ngos/CIAM-HREV_Panama76.doc [accessed Mar. 17, 2010] [hereinafter CERD Report]; Judicial Code of the Republic of Panama, art. 97, no. 15, available at: <http://www.organojudicial.gob.pa/cendoj> [accessed Apr. 3, 2010] [hereinafter Judicial Code].

¹⁴⁶ Constitution, *supra* note 11, art. 19.

¹⁴⁷ Instituto Interamericano de Derechos Humanos (IHR), *Personas Indigenas privadas de libertad en Panama*, American Classroom Educational Convention, 22-24 October

the number incarcerated are difficult to determine because those who do not speak Spanish are often mistakenly categorized as from another country and the government neglects to track the numbers.¹⁴⁸ The DGSP says there are 44 indigenous prisoners out of 11,270, but the figure is estimated by others to be much higher—up to 25% of certain prison peopless.¹⁴⁹

Geographic and Linguistic Isolation from Equal Justice for the Indigenous

60. Equal access to justice for the indigenous is impeded by the distance from the provincial capitals. They must often relocate in order to attend to their judicial obligations, a consideration that would likely lead to increased incidents of unjustified pretrial detention. Additionally, non-Spanish speaking indigenous peopless are disadvantaged because there are very few interpreters.¹⁵⁰ Relatives have to travel farther to maintain relationships and often can't afford phone contact. There is no cellular service in many rural areas.¹⁵¹

Overcrowding of Facilities

61. Overcrowding is well known and admitted by the government of Panama and compromises all aspects of living conditions by increasing the number of peoples using resources intended for less.

2008 (on file with the University of Oklahoma Human Rights Clinic) [hereinafter IIHR Presentation].

¹⁴⁸ Danilo M. Toro Lozano, Defensoria del Pueblo de la Republica de Panama, *Analysis Preliminar de los Datos Censales en los Centros Penitenciarios de la Republica de Panama*, June 15, 2003, available at: <http://www.defensoriadelpueblo.gob.pa/uploads/subsectionpdf/707.pdf> [accessed Mar. 17, 2010] [hereinafter Ombudsman Census Report].

¹⁴⁹ IIHR Presentation, *supra* note 28.

¹⁵⁰ CERD Report, *supra* note 26, 8.

¹⁵¹ IIHR Presentation, *supra* note 28.

62. According to the DGSP, as of February 1, 2010, 10,342 occupy Panama's prisons meant to hold 7,145.¹⁵² There are only eleven general practitioners, one gynecologist, and one psychiatrist for ten-thousand inmates.¹⁵³ There is a shortage of food and the food prisoners are given is sometimes raw or decomposing.¹⁵⁴ In order to maintain proper nutrition, prisoners must pay extra. Those from impoverished backgrounds, like the indigenous, are most at risk for going without enough food.¹⁵⁵ Several inspections by the Ombudsman have found that prisons, even those that are not overcrowded, lack essential sanitary infrastructure and fecal matter is deposited in plastic bags or whatever containers are accessible. Other shortages include the lack of medicine for the estimated 1 in 10 prisoners with HIV or AIDS. The poor ventilation leads to a rapid spread of tuberculosis and other ailments.¹⁵⁶ Widespread prisoner on prisoner and guard on prisoner violence is another result of too many prisoners in each facility and the shortage of staff.¹⁵⁷

Pre-trial detention

¹⁵² Ministerio de Gobierno y Justicia, Direccion de Administracion y Finanzas, Departamento de Estadistica, *Poblacion Penitenciaria en la Republica por Sexo, Situacion Jurica y Autoridad Competente, Segun Centros Penitenciarios y Carceles Publicas*, available at: <http://www.sistemapenitenciario.gob.pa/uploads/static/1.pdf> [accessed Mar 17, 2010]

¹⁵³ Defensoria del Pueblo de la Republica de Panama, *Informe Especial de la Defensoria del Pueblo de la Republica de Panama Relativo al Derecho a la Salud en los Penitenciarios*, 4, 2008, available at: <http://www.defensoriadelpueblo.gob.pa/uploads/subsectionpdf/706.pdf> [accessed Apr. 3, 2010] [hereinafter Ombudsman Health in Prisons Report]

¹⁵⁴ *Id.* at 6.

¹⁵⁵ IIHR Presentation, *supra* note 28.

¹⁵⁶ Ombudsman Health in Prisons Report, *supra* note 32, at 10-11.

¹⁵⁷ ICCPR Implementation, *supra* note 13, para. 151.

63. At least 57 percent of prisoners are pretrial detainees.¹⁵⁸ Pretrial detentions are often prolonged and sometimes more than the maximum sentence for the alleged crime.¹⁵⁹ The problem continues in part because of the inquisitorial system and the use of corrupt administrative judges with little legal training. Outside of Panama City, this is a major problem. Sentencing is guided by wealth and ability to pay fines. Since the indigenous peoples are generally poor and living in rural areas they are likely much more affected than others.¹⁶⁰

64. Even if the judges are not corrupt, they may choose to detain those awaiting trial because they have no other alternatives to be able to ensure their presence at trial. There is an “electric monitoring bracelet pilot project” that aims to allow a detainee to stay at home during an investigation. If implemented, this could be an effective way to combat the overcrowding and excessive pretrial detention violations.¹⁶¹

Mental and Physical Abuse

65. There were 128 official complaints of mental and physical abuse from 1999-2008, though prisoners expressed fear of retaliation if they complained. Because the National Police are the alleged abusers and work closely with the prosecutors who would investigate and prosecute violations, this fear is justified and the abuse is likely worse than the official record.¹⁶² Official complaints include many beatings, partial suffocation

¹⁵⁸ US State Department Bureau of Democracy, Human Rights, and Labor, *2008 Human Rights Report: Panama*, Feb. 25, 2009, available at: <http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119168.htm> [accessed Apr. 3, 2010] [hereinafter State Department Report].

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ ICCPR Implementation, *supra* note 13, para. 112-129.

¹⁶² Ricardo Julio Vargas, Defensoria Del Pueblo de la Republica de Panama, Oficina de Proteccion de los Derechos Humanos de las Personas Privadas de Libertad, *Informe Especial relative a las denuncias sobre supuestos Actos de Tortura, Tratos Crueles, Inhumanos y Degradantes en los Centros Penitenciarios de Panama*, 2008, available at:

and the use of electric shocks.¹⁶³ Since the National Police often act as gap fillers in the staffing of civilian guards positions, they lack the training to prevent abuses.¹⁶⁴

Recommendations

- Employ indigenous prison and ombudsman personnel capable of communicating with and sufficiently identifying the needs of non-Spanish speaking indigenous peoples
- Include a count of the indigenous peoples as a subset of those incarcerated in future censuses.
- Provide resources within the indigenous communities that help maintain family relationships with incarcerated individuals (for ex. cellular telephone towers).
- Continue the development of programs to decrease pretrial detention.

<http://www.defensoriadelpueblo.gob.pa/uploads/subsectionpdf/710.pdf> [accessed Mar. 17, 2010]; State Department Report, *supra* note 37.

¹⁶³ *Id.*

¹⁶⁴ State Department Report, *supra* note 37.