EARTHJUSTICE

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CIEL

February 18, 2014

To: **Ms. Raquel Rolnik**, Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context

Mr. James Anaya, Special Rapporteur on the rights of indigenous peoples

Mr. Olivier de Schutter, Special Rapporteur on the right to food

Ms. Catarina de Albuquerque, Special Rapporteur on the human right to safe drinking water and sanitation

Ms. Magdalena Sepúlveda Carmona, Special Rapporteur on extreme poverty and human rights

Mr. Kishore Singh, Special Rapporteur on the right to education

cc: **Mr. John Knox**, Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment

Ms. Alexandra Guaqueta, Chair of the Working Group on the issue of human rights and transnational corporations and other business enterprises

Via: urgent-action@ohchr.org; srhousing@ohchr.org; indigenous@ohchr.org; srfood@ohchr.org; srwatsan@ohchr.org; srextremepoverty@ohchr.org; sreducation@ohchr.org; cc: ieenvironment@ohchr.org; wg-business@ohchr.org

Re: **Imminent Forced Evictions of Indigenous Ngöbe Families due to Barro Blanco Dam in Panama**

Dear Special Rapporteurs Rolnik, Anaya, de Schutter, de Albuquerque, Sepúlveda, and Singh:

The Movimiento 10 de Abril para Defensa del Rio Tabasará (M10), the Interamerican Association for Environmental Defense (AIDA), the Center for International Environmental Law (CIEL), and Earthjustice respectfully submit this urgent appeal to United Nations Special Procedures on behalf of members of the indigenous Ngöbe community who imminently face forced eviction from their land due to the Barro Blanco hydroelectric dam project in western Panama.

A project registered under the Kyoto Protocol's Clean Development Mechanism (CDM), the dam is projected to displace approximately 270 indigenous people who neither were consulted nor gave their consent to leave their land, and who depend on their land for physical, socio-economic, and cultural survival. **We ask that you call upon 1) the State of Panama to suspend the eviction processes and dam construction until it has complied with its obligations under international law; 2) the States of Germany and the Netherlands, as well as the member States of the Central American Bank for**

Economic Integration (CABEI),[1] to suspend the financing of the project until each country has taken appropriate measures to prevent their respective development banks from violating the Ngöbe's human rights.

The process of forced eviction has begun. Despite a domestic lawsuit challenging the Barro Blanco project approval, the dam is 64% complete (as of the end of 2013), and is expected to be fully constructed as early as May of 2014.[2] On February 7, 2014, Panama's National Public Services Authority (ASEP) notified Mr. Manolo Miranda that the authorities will enter his land at 10:00 AM on February 17, 2014 to enable access for the company Generadora del Istmo (GENISA).[3] Approximately 50 people in his family live on that land. In addition to their houses, the plants and trees that support the bulk of the indigenous communities' diet are located there, and will be flooded by the dam. Also on this land is the central school for Ngöbe culture, language, and religion. The February 7th notice to Mr. Miranda identified six additional affected families, or approximately 270 people based on community estimates.[4] Although ASEP annulled the February 7th decision, the communities were not informed of that decision until the day after the evictions were expected to occur,[5] and the affected communities remain fearful that evictions could happen at any time.[6]

The M-10, AIDA, CIEL, Earthjustice, and other NGOs, on behalf of the affected communities, have raised the actual and imminent violations of the Ngöbe's rights to consultation and consent in letters to Special Rapporteur James Anaya (dated June 14, 2013 and September 20, 2013) and Independent Expert John Knox (June 24, 2013); interventions related to reform of the CDM's governing rules; an amicus brief to the Supreme Court of Panama in a challenge to the approval of the EIA (August 29, 2013); and meetings and communications with the German and Dutch development banks financing the project. These efforts have sought suspension of dam construction and finance disbursement until Panama has complied with its duties, but have proven ineffective to date.

This appeal focuses on the specific issue of forced evictions because forcing the affected Ngöbe communities from their land – which provides their primary sources of food and water, their means of subsistence, and the roots of their culture – imminently threatens to violate their human rights to

[1] CABEI's member States are Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica, Panama, Dominican Republic, Mexico, Taiwan, Argentina, Colombia, and Spain. *See* CABEI, *About CABEI: Organizational Structure*, *available at* http://www.bcie.org/?cat=1066&title=Governors&lang=en.

[2] Centro de Incidencia Ambiental (CIAM), Impulso Procesal, Demanda Contencioso Administrativa de Nulidad Interpuesta por Félix Wing Solís en nombre y representación de Adelaida Miranda, Ítalo Jiménez, Eugenio Carpintero, Manolo Miranda contra la Resolución DIEORA IA-332-2008 de 9 de mayo de 2008 de la Autoridad Nacional del Ambiente, Exp. 352-11, Magistrado Ponente Víctor Leonel Benavides, Feb. 6, 2014, *at* http://www.midiario.com/2014-01-08/interior/barro-blanco-avanza-en-64; *see also* Flor Bocharel, Barro Blanco podría iniciar operaciones en 2014, LA PRENSA (Apr. 11, 2013), *available at* http://www.prensa.com/impreso/nacionales/barro-blanco-podria-iniciar-operaciones-2014/220416.

[3] Autoridad Nacional de los Servicios Públicos (ASEP), Edicto de Notificación No. OAL-09-14, Feb. 7, 2014.

[4] *See id*.

[5] ASEP, Communication annulling *id.*, *available at* Sistema de Lecto y Escritura del Idioma Ngäbe website, https://www.facebook.com/SistemaDeLectoYEscrituraDelIdiomaNgabe.

[6] Conversation between Weni Bagama and Abby Rubinson (Feb. 18, 2014).

adequate housing; property, including free, prior and informed consent; food, water and means of subsistence; and culture; and education.

We call upon you to urge:

- **Panama** to suspend the eviction processes and dam construction until Panama has complied with its international human rights obligations related to forced evictions, including the requirement to obtain indigenous peoples' free, prior, and informed consent before relocating them from their land; and

- **Germany and the Netherlands**, whose development banks are financing the project, and the **member States of CABEI**, a multilateral development bank that is financing the project, to halt disbursement of any remaining funds until each country has taken appropriate measures to ensure compliance with its obligations, including with respect to international development assistance, under international law.

Building on Special Rapporteur on the right to food Olivier de Schutter's recognition that CDM projects may lead to forced evictions,[7] we call upon you to recognize the potential human rights impacts of CDM projects, given the lack of effective standards to ensure that host countries satisfy its dual objectives to reduce carbon emissions and promote sustainable development.[8] We further call upon you to recognize that CDM projects must be designed and implemented in a manner that respects human rights obligations.[9] As illustrated by the Barro Blanco dam project, Panama's failure to protect the Ngöbe from being forcibly displaced from their land without their consent casts serious doubt on the CDM's ability to ensure respect for human rights in accordance with international law.

I. Factual Background

A. The Barro Blanco project

The Barro Blanco hydroelectric dam project is a 28.84 MW dam under construction on the Tabasará River in the Province of Chiriquí in western Panama, adjacent to the Ngöbe-Buglé *comarca* (indigenous territory). Flooding from the Barro Blanco dam project will directly affect the Ngöbe communities of Quebrada Caña, Kiad, and Nuevo Palomar. Based on the 2010 census, the company building the project,

[7] In his 2010 interim report on the right to food, Special Rapporteur de Schutter provides "Measures adopted with a view to climate change mitigation … have created further conflicts with the rights of land users. Under the clean development mechanism … countries that have committed to reducing greenhouse gas emissions receive additional emission credits if they help to implement emissions-reducing projects in developing countries." Interim Report of the Special Rapporteur on the right to food, U.N. Doc. A/65/281 (Aug. 11, 2010), para. 8, *at* http://www.srfood.org/images/stories/pdf/officialreports/20101021_access-to-land-report_en.pdf, para. 8.

[8] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, art. 12, U.N. Doc. FCCC/CP/1997/7/Add.1, 37 I.L.M. 22, entered into force Feb. 16, 2005.

[9] *See e.g.* Catarina de Albuquerque, Climate Change and the Human Rights to Water and Sanitation: Position Paper, OHCHR (2009), 1, *at* http://www2.ohchr.org/english/issues/water/iexpert/docs/ClimateChange_HRtWS.pdf ("Climate change policy responses must be designed and implemented in a manner that respects" their obligations in guaranteeing the rights to water and sanitation).

GENISA, estimated that over 400 people live in those communities.[10] A UNDP expert-led assessment visited the affected communities in 2013 and observed that "the three communities … appear to be more numerous than indicated by the 2010 census."[11] According to a 2012 UNDP report, the project will flood six houses,[12] affecting approximately 270 people based on community estimates. No one in these communities was consulted prior to the decision to approve the project.

Notably, several assessments of the dam's impacts have underestimated the area affected by flooding.[13] UNDP reports from as recently as September 2013 have clarified the extent of the area at risk of being flooded and identified which land – and houses – would be acquired for the dam. Specifically, the September 2013 UNDP Expert Assessment Report established that the flood level attributable to the dam is several meters higher than the level given in previous studies, including GENISA's 2011 Environmental and Social Summary Report and the UNDP's 2012 Mission Verification Report.[14] The difference in flood levels means that additional houses – and community members – now are within the project's flood zone. Yet, GENISA and Panama have not acknowledged the risk to these additional areas.

In addition, the stated impacts were likely underestimated in the pre-2013 assessments because those assessments failed to consider that "[t]he community acts as a whole, and obtains resources that are present in different places there."[15] "Given [this] cohesion, … [t]he impact with respect to access and use of resources will affect not only the families that will suffer the flooding of their lands, but also those impacts will affect directly and indirectly all of the inhabitants of the three communities."[16] This is especially significant because, as documented in the UNDP reports, the Ngöbe depend on their land for food, water and subsistence, and this land is integral to their culture.[17] *See* sections II.A.2-4, *infra*.

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[10] GENISA, Environmental and Social Impacts Summary Report (2011), p. 37 (Quebrada Caña: 184; Kiad: 35; Nuevo Palomar: 200 (based on 2010 census figures for the Ngöbe-Buglé comarca)), *at* http://www.genisa.com.pa/wp-content/uploads/2012/06/Resumen-Ejecutivo-de-Reporte-Socio-Ambiental-PHBB-072811.pdf.

[11] UNDP, Peritaje al proyecto Barro Blanco: Resultados del Diagnóstico Rural Participativo (Aug. 29, 2013) ("UNDP Peritaje – Rural Diagnóstico Participativo"), para. 4, *at* http://media.gestorsutil.com/PNUD_web/651/centro_informacion_documentos/docs/0276982001378499109.pdf

[12] UNDP, Informe de la Misión de Verificación (Dec. 2012) ("UNDP Informe"), p. 33, *at* http://www.bananamarepublic.com/informe_mision_verficacion_final_20121219.pdf.

[13] UNDP, Peritaje Independiente de la presa de Barro Blanco, Panamá: informe final de la componente de ingeniería hidráulica (Sept. 5, 2013) ("UNDP Peritaje – Hidráulica"), para. 8.2.1, *at* http://media.gestorsutil.com/PNUD_web/651/centro_informacion_documentos/docs/0910718001378499234.pdf *see also* UNDP, Peritaje al Proyecto Hidroeléctrico Barro Blanco: Análisis de los Aspectos Ecológicos y Económicos (Sept. 2, 2013) ("UNDP Peritaje – Ecológico y Económico"), para. 102, *at* http://media.gestorsutil.com/PNUD_web/651/centro_informacion_documentos/docs/0981925001378498682.pdf

[14] UNDP Peritaje – Hidráulica, para. 8.2.1. This report concluded that "the area affected by the dam's reservoir should be delimited by the flood zone possible during a flood, not the zone corresponding to the reservoir's normal level of 103 meters above sea level, as had been done until now." In addition, the report recommended using the 100-year flood level as the criterion for demarcating the flood area on the margin of acceptable risk (noting that the Technical Roundtable had decided to use another level).

[15] UNDP Peritaje – Rural Diagnóstico Participativo, para. 4.

[16] UNDP Peritaje – Ecológico y Económico, para. 15.

[17] UNDP Informe, pp. 18-30, 37; UNDP Peritaje – Ecológico y Económico, paras. 18, 112, 127; UNDP Peritaje – Rural Diagnóstico Participativo, paras. 4, 90-95, 99-100.

Beyond the tangible value of the land, "[t]here is a great fondness for the land and its resources. The residents have a very simple life but perceive that they have no important necessity unsatisfied."[18] This is true despite the fact that "[i]n the Tabasará River basin, the socio-economic levels of the Ngöbe-Buglé comarca register at a 95% poverty rate and 86% extreme poverty rate, with the annual per capita income level of B/519.00, that is, six times less than the national average. Illiteracy is at 46%, child malnutrition at 50%, and the Human Poverty index is the lowest in the country, at 0.363 (0.707 national), indicating high economic deficiency and high social vulnerability."[19]

Because the Ngöbe depend on their land and natural resources for their physical, socio-economic, and cultural survival, they have resisted development that threatens their traditional lands. The Barro Blanco dam project has become emblematic of such harmful development and has spurred conflict between the government and indigenous peoples, including protests that have ended in violence against environmental defenders. The project's registration under the CDM raises additional concerns regarding the legitimacy and effectiveness of this mechanism, and highlights the need for human rights protections in the CDM.

B. The eviction process

On September 20, 2013, ASEP notified the first of the affected Ngöbe families of eviction from their land.[20] Although ASEP issued the eviction notice to Mr. Manolo Miranda, his family of approximately 50 people live on that land and thus face eviction as well.[21] The sole school for the Ngöbe language, religion, and culture is also located there.[22] The eviction notice assigned a value of $4000 balboas (equivalent to $4000 USD) in compensation for taking this land.[23]

In December 2013, the Environmental Advocacy Center of Panama (CIAM), filed a lawsuit on Mr. Miranda's behalf in Panamanian court to challenge the decision to authorize taking of his family's land for the construction of the Barro Blanco project.[24] Mr. Miranda has asked the court to order immediate suspension of the eviction but there is no indication of when the court will reach a decision.[25] In February 2014, members of the affected Ngöbe communities created an encampment along the banks

[18] UNDP Peritaje – Rural Diagnóstico Participativo, para. 4.
[19] *Id.* para. 14.
[20] *See* ASEP, Edicto de Notificación AOL 262-13, Sept. 20, 2013.
[21] Demanda Contencioso Administrativa de Plena Jurisdicción, con Solicitud Especial de Suspensión Provisional, promovida por Tania Arosemena Bodero y Juan Diego Alvarado de León, en nombre y representación de Manolo Miranda, contra la Resolución AN No. 6103-ELEC de 22 de abril de 2013, proferida por la Administradora General de la Autoridad Nacional de los Servicios Públicos (ASEP) ("Demanda"), Dec. 26, 2013, section IV., para. 3
[22] *See* UNDP Informe de la Misión de Verificación at 33 (noting flood area within 8 meters of the school); *see also* Peritaje – Hidráulica, para. 8.2.1 (noting that the flood area is higher than the previously established level of 103 meters above sea level).
[23] *See* ASEP, Edicto de Notificación AOL 262-13, Sept. 20, 2013, Annex A.
[24] *See* Demanda.
[25] *See* Demanda, section VI.

of the Tabasará River at the border of the Ngöbe-Buglé comarca, and plan to stay there as long as necessary to prevent machinery from entering their land.[26]

On February 7, 2014, ASEP notified Mr. Manolo Miranda that the company Generadora del Istmo (GENISA) is authorized to enter his land at 10:00 AM on February 17, 2014.[27] Although ASEP announced on February 18 that it had annulled that decision,[28] ASEP provided no details about timing of next steps, leaving the affected communities fearful that evictions could happen at any time.[29]

The February 7th notice identified six additional affected families, or approximately 270 people based on community estimates. The 2012 UNDP report had identified five or six additional families in the indigenous communities that expect to be displaced, not including those community members who reside in the additional areas of flooding later identified in the 2013 UNDP expert assessment.[30]

Ngöbe community members camping at Tabasará River in opposition to Barro Blanco project, Feb. 2014

II. Panama, Germany, the Netherlands, and the member States of CABEI all have human rights obligations, including the duty to refrain from unjustified forced evictions

Under international law, all States are bound by obligations to respect, protect, and fulfill human rights. These obligations require States to ensure that their activities do not cause rights violations, including

[26] Conversation between Weni Bagama and Abby Rubinson (Feb. 5, 2014); *see* photo from Weni Bagama to Abby Rubinson (Feb. 3, 2014), above.
[27] ASEP, Edicto de Notificación No. OAL-09-14, Feb. 7, 2014.
[28] ASEP, Communication annulling *id.*, *available at* Sistema de Lecto y Escritura del Idioma Ngäbe website, https://www.facebook.com/SistemaDeLectoYEscrituraDelIdiomaNgabe.
[29] Conversation between Weni Bagama and Abby Rubinson (Feb. 18, 2014).
[30] UNDP Peritaje – Hidráulica, para. 8.2.1.

those arising from "forced evictions from home(s) and land."[31] These obligations further require States to ensure that "other parties within the State's jurisdiction and effective control do not violate the human rights of others."[32] The right to adequate housing requires States, at minimum, to "refrain from forced evictions and ensure that the law is enforced against its agents or third parties who carry out forced evictions."[33] In addition, "[s]tates must refrain from introducing any deliberately retrogressive measures with respect to de jure or de facto protection against forced evictions."[34]

While States bear the primary obligation for ensuring protection of human rights, this does not "absolve other parties, including project managers and personnel, international financial and other institutions or organizations, transnational and other corporations, and individual parties … of all responsibility."[35] In the case of Barro Blanco, the State of Panama, the States of Germany and the Netherlands (whose development banks are financing the project), and the member States of CABEI (a multinational development bank financing the project) all have the duty to respect human rights, including refraining from forced evictions unless they are justified by exceptional circumstances and in accordance with international law. The Maastricht Principles on Extraterritorial Obligation of States in the area of Economic, Social and Cultural Rights ("Maastricht Principles") make clear that States' responsibility is engaged when their conduct foreseeably poses a "real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially."[36] As described below, the forced evictions in the case of Barro Blanco are not justified under international law.

A. Panama has failed to meet its obligations to protect the Ngöbe from human rights abuses associated with the Barro Blanco dam, in particular the imminent and forced eviction of the Ngöbe people from their traditional homes

The imminent and forced eviction of Mr. Miranda and his family, whose lives and livelihoods vitally depend on their land along the banks of the Tabasará River, threatens their rights to adequate housing; property, including free, prior and informed consent; food, water and means of subsistence; culture; and education.

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[31] Basic Principles and Guidelines on Development-based Evictions and Displacement (Annex 1 of the report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living) ("UN Guidelines for Development-based Evictions and Displacement"), U.N. Doc. A/HRC/4/18 (Feb. 5, 2007), para. 1, *at* http://www.ohchr.org/Documents/Issues/Housing/Guidelines_en.pdf; *see also* International Covenant on Economic, Social and Cultural Rights ("ICESCR"), Dec. 16, 1966, art. 11(1), 6 I.L.M. 360; Convention on the Rights of the Child ("CRC"), Nov. 20, 1989, art. 27(3), 28 I.L.M. 1448; Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW"), Dec. 18, 1979, art. 14(2)(h), 19 I.L.M. 33; International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, art. 5(e), 660 U.N.T.S. 195.

[32] UN Guidelines on Development-Based Evictions and Displacement, para. 12.

[33] CESCR, General Comment 7: Forced evictions, and the right to adequate housing, 16th Sess., para. 4, U.N. Doc. E/1998/22, annex IV at 113 (1997); *see also* UN Guidelines on Development-Based Evictions and Displacement, para. 58 ("Persons, groups or communities affected by an eviction should not suffer detriment to their human rights, including their right to the progressive realization of the right to adequate housing.").

[34] UN Guidelines on Development-Based Evictions and Displacement, para. 18.

[35] *Id.* para. 11.

[36] ETO Consortium, Maastricht Principles on Extraterritorial Obligation of States in the area of Economic, Social and Cultural Rights ("Maastricht Principles"), Sept. 28, 2011, para. 13.; *see also id.* paras. 19-21, 23-27.

1. Panama is violating the Ngöbe's right to housing by forcibly evicting them from their lands

Under the right to housing, "all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats."[37] Forced evictions are thus *prima facie* incompatible with the International Covenants on Human Rights. Under international law, forced eviction can only be justified (i) in "the most exceptional circumstances"; (ii) after all feasible alternatives to relocation have been considered in consultation with the affected people; (iii) with the recognition that forced eviction should not leave the affected people vulnerable to homelessness or other human rights violations; (iv) "in strict compliance with the relevant provisions of international human rights law and in accordance with general principles of reasonableness and proportionality"; and (v) with adequate and effective procedural protections, including a fair hearing to challenge the eviction and protection from eviction during those proceedings.[38]

(i) in "the most exceptional circumstances"

Panama has failed to establish that "the most exceptional circumstances" exist to justify forced evictions.[39] Although Panama asserts that the Barro Blanco project is "urgent" and in the "public interest,"[40] this is insufficient to justify eviction. According to the UN Declaration on Indigenous Peoples' Rights, which prohibits relocation of indigenous peoples without their free, prior and informed consent, any limitation on the rights in the Declaration "shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society."[41] Similarly, any limitation on rights in the International Covenant on Economic, Social and Cultural Rights, including the rights to housing, food, water, culture, and education, must be undertaken "solely for the purpose of promoting

[37] CESCR General Comment 7, para. 1 (citing General Comment No. 4); *see* CESCR, General Comment 4: The right to adequate housing (Art.11 (1)), 6th Sess., para. 8(a), U.N. Doc. E/1992/23, annex III at 114 (1991).
[38] CESCR General Comment 7, paras. 3, 5, 11, 13-16; CESCR General Comment 4, para. 18; *see also* UN Guidelines on Development-Based Evictions and Displacement, para. 21.
[39] *See* CESCR General Comment 4, para. 18.
[40] Resolución AN No. 6103-Elec de 22 de abril de 2013, "Resuelve," para. 1 "declarar de interés público y de carácter urgente la construcción del proyecto Central Hidroeléctrica Barro Blanco," *at* http://www.asep.gob.pa/openpdf.php?idresol=AN%20No.6103-Elec.; *id.* para. 6 (quoting Ley 18 de 26 de marzo de 2013, art. 138-A: "Procedimiento sumario para el uso y adquisición de inmuebles y servidumbres. El beneficiario de la concesión o de la licencia podrá solicitar a la Autoridad Nacional de los Servicios Públicos la aplicación del procedimiento sumario para el uso y adquisición de inmuebles y servidumbres, cuando la construcción de cualquiera obra o trabajo, relacionado con las actividades de generación, interconexión, transmisión y distribución de electricidad destinadas al servicio público, sea calificada por la Autoridad Nacional de los Servicios Públicos **como de carácter urgente para satisfacer necesidades básicas de la comunidad,** y que las partes no han logrado un acuerdo previo en un plazo de quince (15) días calendario.") (emphasis added), *at* http://www.energia.gob.pa/pdf_doc/MarcoLegal/B-Sector-Electrico/Ley18-2013(GO27254).pdf.
[41] United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), G.A. Res. 61/295, arts. 10, 46(2), U.N. Doc. A/Res/61/295 (Sept. 13, 2007).

the general welfare,"[42] which is defined as "steps taken by States consistent with their international human rights obligations, in particular the need to ensure the human rights of the most vulnerable."[43]

Indeed, it is not enough to merely assert the "public interest" to justify eviction. "[D]evelopment-based evictions include evictions often planned or conducted under the pretext of serving the 'public good,' such as those linked to development and infrastructure projects."[44] As UN Habitat observed, "forced population displacements caused by development programs … are almost never officially referred to as cases of forced eviction. They are, instead, elaborately justified in the name of the broader public good and given developmental process names such as 'infrastructural development,' 'nature conservation,' [and] 'rural development.'"[45] UN Habitat continued:

> This is not to say that none of the projects are genuinely aimed at the public interest. However, even in such public interest projects, the methods of decision-making, design and implementation, and specifically the manner in which the affected people are treated, would in the majority of cases qualify as forced evictions as defined under international law, … and would, therefore, amount to gross violations of human rights.[46]

Consequently, States must show that "eviction is unavoidable and consistent with international human rights commitments protective of the general welfare."[47] Because indigenous peoples face eviction without their free, prior and informed consent, Panama must show that forced relocation is "strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society."[48] By declaring that the Barro Blanco project is "urgent and in the public interest" without providing a full justification for this determination,[49] Panama has failed to establish "exceptional circumstances" to the prohibition on forced evictions under international law.[50]

(ii) after exploring all feasible alternatives to relocation in consultation with the affected people

Further, Panama has violated the affected Ngöbe's rights to housing by failing to "explore fully all possible alternatives to evictions" and by failing to do so in consultation with them.[51] The affected

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[42] CESCR General Comment 7; *see also* International Covenant on Civil and Political Rights ("ICCPR"), Dec. 16, 1966, art. 4, 6 I.L.M. 368; ICESCR, art. 4; UN Guidelines on Development-Based Evictions and Displacement, para. 21.
[43] UN Guidelines on Development-Based Evictions and Displacement, para. 21.
[44] *Id.* para. 8.
[45] UN Habitat, Losing Your Home: Assessing the Impact of Eviction (2011), 1, *at* http://www.unhabitat.org/pmss/getElectronicVersion.aspx?nr=3188&alt=1.
[46] *Id*.
[47] UN Guidelines on Development-Based Evictions and Displacement, para. 40; *see also* CESCR General Comment 7, paras. 2 and 5.
[48] *See* UNDRIP, arts. 10 and 46(2).
[49] Resolución AN No. 6103-Elec de 22 de abril de 2013, "Resuelve," para. 1.
[50] *See* CESCR General Comment 4, para. 18; UN Guidelines on Development-Based Evictions and Displacement, para. 21 ("States shall ensure that evictions only occur in exceptional circumstances. Evictions require full justification given their adverse impact on a wide range of internationally recognized human rights.").
[51] CESCR General Comment 7, para. 13; *see also* UN Guidelines on Development-Based Evictions and Displacement, para. 38.

Ngöbe communities were never consulted about alternatives to eviction, and there is no indication that the impacts of eviction factored into the consideration of alternatives.[52] In fact, GENISA's initial EIA for the project did not describe *any* impacts in indigenous areas, and its 2011 environmental and social summary report stated that "[n]obody will be relocated because of the project."[53] To the extent that any assessment of eviction impacts has occurred, such as the UNDP-led site visits, the decision had already been made to approve the project designed in a way that would flood indigenous territory and thus force the people living there from their land.

Even if decision-makers did take any eviction impacts into account, the affected people were not consulted about those impacts in the context of exploring alternatives. As the Guidelines on Development-Based Evictions and Displacement make clear: "All potentially affected groups and persons, including women, indigenous peoples and persons with disabilities, as well as others working on behalf of the affected, have the right to relevant information, full consultation and participation throughout the entire process, and to propose alternatives that authorities should duly consider."[54]

Although Panamanian law previously guaranteed communities the right to participate in energy-related decisions that would affect them, and that those decisions would "be taken with prior consultation with those communities,"[55] the summary procedure for taking land for energy projects adopted in March 2013 did not expressly retain any requirement to meaningfully consult with the affected people.[56] In the case of Barro Blanco, the affected Ngöbe communities received no information about alternatives, were never consulted about the evictions (or even the project itself), and were given no chance to propose alternatives for the authorities to consider.

(iii) without leaving the affected people vulnerable to homelessness or other human rights violations

[52] *See* Demanda, sec. III, para. 5 ("[E]n el peritaje independiente llevado a cabo por la Organización de las Naciones Unidas, … se reconoce que el proceso de consulta previa a los grupos indígenas afectados, fue terriblemente inadecuado, además, establece que 'existen impactos intangibles relacionados a la cultura de las comunidades Ngäbe y a su forma de vida tradicional.' Estos impactos no han sido tomados en cuenta para constituir la valoración de 'interés público.'"); *see id.* (noting pending lawsuit challenging environmental approval due to lack of adequate and prior consent from the communities in the decision-making processes).

[53] GENISA, Environmental and Social Impacts Summary Report, section 1.0.

[54] UN Guidelines on Development-Based Evictions and Displacement, para. 38; *see* CESCR General Comment 7, para. 13 ("States parties shall ensure, prior to carrying out any evictions, and particularly those involving large groups, that all feasible alternatives are explored in consultation with the affected persons, with a view to avoiding, or at least minimizing, the need to use force.").

[55] Ley 6 de 3 de febrero de 1997, art. 149; *see id.* art. 125 (establishing that forced land acquisition be conducted in accordance with other provisions in the law). That law further requires that "[d]uring the phase of the impact assessment and as a condition to execute projects of electricity generation and transmission," the company "must inform affected communities of" the anticipated social and environmental impacts, the planned mitigation activities, and the mechanisms necessary to involve the affected people in the implementation of the environmental and social mitigation plans. Ley 6 de 3 de febrero de 1997, art. 153.

[56] *See* Ley 18 de 26 de marzo de 2013, art. 138-A at http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_NORMAS/2010/2013/2013_601_4485.PDF.

Panama is violating the Ngöbe's right to housing because forcibly evicting them from their land will leave them vulnerable to other human rights violations. As the Committee on Economic, Social and Cultural Rights has made clear: "Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights."[57] As discussed in sections II.A.2-4, "forced evictions frequently violate other human rights"[58] and constitute "gross violations of a range of internationally recognized human rights, including the human rights to adequate housing, food, water, health, education, work, security of the person, security of the home, freedom from cruel, inhuman and degrading treatment, and freedom of movement."[59] Given the Ngöbe's dependence on their land for physical, socio-economic, and cultural survival, forcibly evicting them from their land will leave them vulnerable to other rights violations, including their rights to housing, food, water, property (including protection from relocation without their free, prior and informed consent), culture, and education, as described in further detail below. The fact that many of the affected people are women and children raises additional concerns given that women and children "suffer disproportionately from the practice of forced eviction."[60] Panama has failed to comply with its duty not to leave people affected by forced eviction vulnerable to other human rights violations.

(iv) "in strict compliance with the relevant provisions of international human rights law and in accordance with general principles of reasonableness and proportionality"

Panama is violating the Ngöbe's right to housing by failing to conduct evictions "in strict compliance with the relevant provisions of international human rights law and in accordance with general principles of reasonableness and proportionality."[61] For a law to justify evictions, it "should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances."[62] In addition, "relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted."[63] As noted above, the UN Declaration on the Rights of Indigenous Peoples only allows limitations on that declaration's rights, including the freedom from relocation without free, prior, and informed consent, when "strictly necessary solely for

[57] CESCR General Comment 7, para. 16; *see also* UN Guidelines on Development-Based Evictions and Displacement, para. 43.
[58] CESCR General Comment 7, para. 4.
[59] UN Guidelines on Development-Based Evictions and Displacement, para. 6; *see also* CESCR General Comment 7, para. 4.
[60] CESCR General Comment 7, para. 10; *see also* Convention on the Elimination of All Forms of Discrimination against Women, art. 14, para. 2(h) ("State parties shall ensure to [women in rural areas] the right … "to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply."); Convention on the Rights of the Child, art. 27.
[61] CESCR General Comment 7, para. 14; *see also id.* ("…[R]ecall General Comment 16 of the Human Rights Committee, relating to article 17 of the International Covenant on Civil and Political Rights, which states that interference with a person's home can only take place "in cases envisaged by the law." The law "should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.").
[62] *Id.* (quoting Human Rights Committee, General Comment 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation) (emphasis added).
[63] *Id.*

the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society."[64]

Regional human rights tribunals have considered the proportionality principle in the context of limitations on the right to property. For example, the Inter-American Court has determined that when faced with "conflicting interests in indigenous claims," the Court must "assess in each case the legality, necessity, proportionality and fulfillment of a lawful purpose in a democratic society (public purposes and public benefit), to impose restrictions on the right to property, on the one hand, or the right to traditional lands, on the other."[65] In making this assessment, the Court noted:

> States must take into account that indigenous territorial rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations. Property of the land ensures that the members of the indigenous communities preserve their cultural heritage.[66]

Similarly, in "assess[ing] whether an encroachment 'in the interest of public need' [wa]s indeed proportionate to the point of overriding the rights of indigenous peoples to their ancestral lands," the African Commission on Human and Peoples' Rights held that "the 'public interest' test is … much more stringent when applied to ancestral land rights of indigenous peoples,"[67] noting:

> Limitations, if any, on the right to indigenous peoples to their natural resources must flow only from the most urgent and compelling interest of the state. Few, if any, limitations on indigenous resource rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental human rights, including the right to life, food, the right to self-determination, to shelter, and the right to exist as a people.[68]

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[64] UN Declaration on the Rights of Indigenous Peoples, arts. 10, 46(2).

[65] *Case of the Indigenous Community Sawhoyamaxa v. Paraguay*, Inter-Am. Ct. H.R., Judgment of Mar. 29, 2006, Series C No. 146, para. 138 (expropriation of land as restitution to indigenous people from whom the land had been taken in violation of international law constituted a valid public purpose) (citing *Case of the Indigenous Community Yakye Axa v. Paraguay*, Inter-Am. Ct. H.R., Judgment of June 17, 2005, Series C No. 125, para. 149); *see also Yakye Axa v. Paraguay*, para. 144 ("[W]hen indigenous communal property and individual private property are in real or apparent contradiction, the American Convention itself and the jurisprudence of the Court provide guidelines to establish admissible restrictions to the enjoyment and exercise of those rights, that is: a) they must be established by law; b) they must be necessary; c) they must be proportional, and d) their purpose must be to attain a legitimate goal in a democratic society."); *Yakye Axa v. Paraguay*, para. 217 ("If the traditional territory is in private hands, the State must assess the legality, necessity and proportionality of expropriation or non-expropriation of said lands to attain a legitimate objective in a democratic society.").

[66] Inter-Am. C.H.R., Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources, OEA/ Ser.L/V/II. Doc. 56/09 (Dec. 30, 2009), *at* http://cidh.org/countryrep/Indigenous-Lands09/Ancestral-Lands.ENG.pdf, para. 117 (citing *Yakye Axa*, para. 146).

[67] *Centre for Minority Rights Development and Minority Rights Group International v. Kenya*, Communication 276/2003, African Comm'n on Human and Peoples' Rights (Feb. 4, 2010), paras. 211-12.

[68] *Id.* para. 212 (quoting Nazila Ghanea and Alexandra Xanthaki (2005) (eds). *"Indigenous Peoples' Right to Land and Natural Resources" in* Erica-Irene Daes "Minorities, Peoples and Self-Determination," Martinus Nijhoff Publishers).

With respect to Barro Blanco, as Special Rapporteur Anaya noted following his visit to Panama, "[w]ithout the agreement or consent of the Ngäbe people, the State could only allow effects to this people's land rights in virtue of a valid public proposal in the name of human rights, and only, by means necessary and proportional to that valid purpose."[69] Here, Panama has failed to ensure that the eviction is "reasonable," "necessary and proportional" to the asserted justification. Panama is expropriating the Ngöbe's land through a summary procedure that is no different for expropriation of indigenous peoples' land than for non-indigenous land. The procedure authorizes the taking of land for projects "of an urgent character to satisfy basic needs of the community,"[70] and the eviction notice provides no details about the "basic needs" or how this project will address them.

The summary procedure provides that the governmental authority will determine the area specifically and strictly necessary for the construction of the work, but this determination rests with the government's discretion.[71] In this case, Panama's declaration that the Barro Blanco project is in the public interest pertains to "all property necessary, convenient, and usually used for construction, installation, and activities of energy generation, connection, transmission, and distribution" for the public.[72] Panama has failed to ensure that the taking of land for the Barro Blanco project is "strictly necessary" and "reasonable and proportional" to the asserted need.

(v) with appropriate procedural protections

Beyond failing to justify its decision and show that "eviction is unavoidable,"[73] exceptional, and reasonable and proportional, Panama has failed to provide "[a]ppropriate procedural protection and due process."[74] These protections include "an opportunity for genuine consultation with those affected"; "adequate and reasonable notice for all affected persons prior to the scheduled date of eviction"; "information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected"; "provision of legal remedies"; and adequate compensation.[75]

Highlighting just a few of these, first, Panama has failed to ensure adequate notice, through culturally appropriate channels and methods."[76] As the UN Guidelines make clear:

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[69] OHCHR, Declaración del Relator Especial sobre los derechos de los pueblos indígenas al concluir su visita oficial a Panamá (July 26, 2013), *available at* http://unsr.jamesanaya.org/statements/declaracion-del-relator-especial-sobre-los-derechos-de-los-pueblos-indigenas-al-concluir-su-visita-oficial-a-panama.

[70] Resolución AN No. 6103-Elec de 22 de abril de 2013, "Resuelve," para. 1; Ley 18 de 26 de marzo de 2013, art. 138-A.

[71] Ley 18 de 26 de marzo de 2013, art. 138-A.

[72] Ley 6, art. 122; *see* Resolución AN No. 6103-Elec de 22 de abril de 2013 (quoting *id.*).

[73] UN Guidelines on Development-Based Evictions and Displacement, para. 40 ("Prior to any decision to initiate an eviction, authorities must demonstrate that the eviction is unavoidable and consistent with international human rights commitments protective of the general welfare."); *see also* CESCR General Comment 7, paras. 2 and 5.

[74] CESCR General Comment 7, para. 15.

[75] CESCR General Comment 7, paras. 13, 15.

[76] UN Guidelines on Development-Based Evictions and Displacement, para. 35.

> Any decision relating to evictions should be announced in writing in the local language to all individuals concerned, sufficiently in advance. The eviction notice should contain a detailed justification for the decision, including on: (a) absence of reasonable alternatives; (b) the full details of the proposed alternative; and (c) where no alternatives exist, all measures taken and foreseen to minimize the adverse effects of evictions.[77]

In the case of Barro Blanco, notice of eviction was not provided in the local language, and did not contain a detailed justification. Rather, the notice merely stated that the project was "urgent … to satisfy the basic needs of the community."[78]

Second, Panama is violating the Ngöbe's right to housing by failing to ensure adequate compensation. In the notice of eviction to Mr. Miranda, Panama declared a cash value as compensation for taking land. Yet, the UN Guidelines on Eviction make clear:

> Cash compensation should under no circumstances replace real compensation in the form of land and common property resources. Where land has been taken, the evicted should be compensated with land commensurate in quality, size and value, or better. … Where the home and land also provide a source of livelihood for the evicted inhabitants, impact and loss assessment must account for the value of business losses, equipment/inventory, livestock, land, trees/crops, and lost/decreased wages/income.[79]

As the UNDP expert assessment explained, in the Ngöbe communities, "[t]he tropical forest that exists along the riverbank of the Tabasará River provides an important source of vegetation, which serves a social and economic function."[80] Land, trees, and crops are vital to the Ngöbe's ability to support themselves as "[t]he majority of the products for their subsistence are provided by their own cultivation, domestic animals, and the environment in which they live."[81] Although the Ngöbe's "local economy is based in subsistence and is produced only for consumption, with very little beyond that for sale," they do sell some of their natural resources "to obtain products that the communities do not produce, like matches, sugar, and salt."[82] Panama's failure to consult with the affected people regarding compensation and failure to provide them land as compensation contravenes its duties to ensure adequate compensation.

According to the Committee on Economic, Social and Cultural Rights, "Appropriate procedural protection and due process … is especially pertinent in relation to a matter such as forced evictions which directly invokes a large number of the rights recognised in both International Human Rights Covenants."[83] Panama has failed to ensure provision of these protections, such as adequate notice,

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[77] *Id.* para. 41.
[78] Resolución AN No. 6103-Elec de 22 de abril de 2013, "Resuelve," para. 1 (quoting Ley 18 de 26 de marzo de 2013, art. 138-A).
[79] UN Guidelines on Development-Based Evictions and Displacement, paras. 60 and 63.
[80] UNDP Peritaje – Ecológico y Económico, 7.
[81] UNDP Peritaje – Rural Diagnóstico Participativo, para. 90.
[82] *Id.*
[83] CESCR General Comment 7, para. 16.

protection from eviction during judicial proceedings, and adequate compensation, to the affected Ngöbe people.

2. Panama is violating the Ngöbe's right to property by failing to consult with, and obtain their free, prior and informed consent, before forcibly evicting them from their lands

Under international law, indigenous peoples have the right to free, prior and informed consent before a State can take certain actions, including forcibly relocating them, from their traditional lands and territories.[84] As derived from the right to property protected under the American Convention on Human Rights and other agreements, indigenous peoples have the right to possess, use, and "freely enjoy" their traditional lands and territories,[85] and to "not be forcibly removed" from them.[86] Where exceptional circumstances exist to the prohibition of forced evictions, States are obligated to obtain the "free, prior and informed consent of the indigenous peoples concerned."[87]

In the case of Barro Blanco, there is no dispute that indigenous people of the Ngöbe communities of Quebrada Caña, Kiad, and Nuevo Palomar will be forcibly removed from their land.[88] No one from these communities was consulted about, let alone consented to, the decision to evict them. In fact, none of the community members was consulted prior to the decision to approve the project, and a pending domestic lawsuit challenges that approval for violating consultation requirements, among others.[89]

To the extent that the Government of Panama, the Central American, Dutch and German development banks, and GENISA have relied on "agreements" between GENISA and members of the indigenous communities, these agreements did not involve or represent the interests of the affected communities.[90] After his visit to Panama last July, Special Rapporteur Anaya noted that the indigenous

[84] *See* UNDRIP, art. 10 ; Convention Concerning Indigenous and Tribal Peoples in Independent Countries ("ILO Convention 169"), June 27, 1989, art. 16.1, 72 ILO Official Bull. 59, 28 I.L.M. 1382; *Case of the Saramaka People v. Suriname*, Judgment of Nov. 28, 2007, Series C No. 172; Inter-Am. C.H.R., Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, para. 107.

[85] *Saramaka*, para. 95; Inter-Am. C.H.R., Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources, para. 107.

[86] UNDRIP, art. 10; *see also* ILO Convention 169, art. 16(1).

[87] UNDRIP, art. 10; *see also* ILO Convention 169, art. 16(3)-(4).

[88] *See generally* UNDP Peritaje reports at http://www.undp.org.pa/centro-informacion/comunicados/en-cumplimiento-a-los-acuerdos-de-la-mesa-tecnica-de-dialogo-expertos-internacionales-presentan-resultados-del-peritaje-independiente-al-proyecto-hidroelectrico-barro-blanco/62.

[89] *See* Demanda Contencioso Administrativa de Nulidad, interpuesta por Félix Wing Solís en nombre y representación de Adelaida Miranda, Ítalo Jiménez, Eugenio Carpintero y Manolo Miranda, contra la Resolución DIEORA IA-332-2008 de 9 de mayo de 2008, de la Autoridad Nacional del Ambiente, May. 31, 2011; Presentación de *Amicus Curiae* [AIDA, CIEL, Earthjustice] dentro del proceso que contiene la Demanda Contencioso Administrativa de Nulidad, interpuesta por Félix Wing Solís en nombre y representación de Adelaida Miranda, Ítalo Jiménez, Eugenio Carpintero y Manolo Miranda, contra la Resolución DIEORA IA-332-2008 de 9 de mayo de 2008, de la Autoridad Nacional del Ambiente, Exp. 352-11: Magistrado Ponente: Víctor L. Benavides, Aug. 29, 2013, available at http://earthjustice.org/sites/default/files/files/BARROBLANCO-AMICUS13029.pdf.

[90] Continuing this pattern, in January 2014, a mission consisting of representatives of FMO, DEG, and CABEI visited Panama regarding the Barro Blanco project, but did not meet with anyone from the communities of Kiad, Quebrada Caña, or Nuevo Palomar. Well before this visit, FMO had received and responded to letters stating that Mr. Miranda was among the affected people and had not been consulted, and the communities had invited FMO

peoples affected by dam and mining projects "allege irregularities in the processes to authorize construction of dams and the processes to reach agreements about those projects,"[91] and then described the Barro Blanco project as a case in point. As recently as 2013 – five years after the EIA was approved – a UNDP-led expert assessment observed:

> With respect to the Barro Blanco Project, there is an evident lack of information and it is obvious that the residents of these communities were not consulted in the correct form.[92]

Following a visit to the Ngöbe-Buglé comarca in July 2013, Special Rapporteur Anaya concluded:

> There should have been adequate consultation with the Ngäbe people before authorizing the dam project. In all cases, and in accordance with international law related to indigenous peoples' rights, there should not be flooding of indigenous peoples' lands, or other effects on their lands, without a prior agreement with the representative authorities of these peoples about the conditions of the flooding or effects.[93]

The government of Panama's failure to obtain the Ngöbe's free, prior and informed consent before deciding to evict them violates international law.

3. Panama is violating the Ngöbe's rights to food and water, and right to means of subsistence by forcibly evicting them from their lands

International law recognizes the right to food,[94] which "requires that each individual, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement."[95] The right to adequate food thus implies both the "availability of food in a quantity and quality sufficient to satisfy the dietary needs of individuals, free from adverse substances, and

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to visit the affected area so it can better understand the impacts. On February 9, 2014, the M-10 wrote to FMO, explaining that their exclusion from these meetings was unacceptable. *See* Movimiento 10 de Abril, Open Letter from the M10 to Bank Representatives (Feb. 9, 2014) (attached). On February 12, FMO representative Renata Norato responded, proposing a teleconference with Mr. Miranda. This form of meeting is not typical for indigenous communities. Ms. Norato did not provide any explanation for her failure to meet with the affected communities while she was in Panama.

[91] Declaración del Relator Especial sobre los derechos de los pueblos indígenas al concluir su visita oficial a Panamá.

[92] UNDP Peritaje – Rural Diagnóstico Participativo, para. 5.

[93] Declaración del Relator Especial sobre los derechos de los pueblos indígenas al concluir su visita oficial a Panamá.

[94] ICESCR, art. 11(1).

[95] Interim Report of the Special Rapporteur on the right to food (citing CESCR, General Comment No. 12: The right to adequate food (Art.11), para. 6.); *see also* Report of the Special Rapporteur on the right to food, Addendum: Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge, U.N. Doc. A/HRC/13/33/Add.2 (Dec. 28, 2009), para. 3 (citing General Comment No. 12, para. 14) ("[E]very State is obliged to ensure for everyone under its jurisdiction access to the minimum essential food which is sufficient, nutritionally adequate and safe, to ensure their freedom from hunger.")

acceptable within a given culture"[96] and the "accessibility of such food in ways that are sustainable and that do not interfere with the enjoyment of other human rights."[97]

As with the right to adequate housing, States' obligations with respect to the right to adequate food are to respect, protect, and fulfill the right,[98] as well as to ensure non-retrogression.[99] To comply with these duties, States must take measures "to ensure that enterprises or individuals do not deprive individuals of their access to adequate food,"[100] should protect the resources "that are important for people's livelihoods,[101] and must not "take any measures that result in preventing such access."[102] In accordance with States' duty of non-retrogression, States must not "take deliberate measures which result in the deterioration of current level of fulfillment of the right to food."[103] Further, States should take "[m]easures … to ensure that the right to adequate food is especially fulfilled for vulnerable population groups and individuals,[104] including indigenous peoples whose "access to their ancestral lands may be threatened."[105] Of particular relevance here, as UN Special Rapporteur on the Right to Food Olivier de Schutter has noted, where forced eviction "leads to depriving [affected] families from their means of producing food, it is also a violation of the right to food."[106]

With respect to the right to water, international law recognizes the right to water as "emanating from, and indispensable for, the realization of the right to an adequate standard of living."[107] The right to water has been explicitly recognized in a wide range of international treaties and other instruments, and provides that everyone is entitled to "sufficient, safe, acceptable, physically accessible affordable water for personal and domestic uses."[108] As articulated in General Comment No. 15, the States' obligations with respect to the right to water are to: refrain from interfering directly or indirectly with the enjoyment of the right; prevent third parties from interfering in any way with enjoyment of the right to water; and adopt the necessary measures directed towards the full realization of this right.[109] In her report on sustainability and non-retrogression, Special Rapporteur on the right to safe drinking water and sanitation, Catarina de Albuquerque explained, "[h]uman rights principles give clear guidance …

[96] CESCR General Comment No. 12, para. 8.
[97] *Id.*
[98] *Id.* para. 14.
[99] *Id.* para. 15.
[100] *Id.*; *see also id*., para. 27 ("As part of their obligations to protect people's resource base for food, States parties should take appropriate steps to ensure that activities of the private business sector and civil society are in conformity with the right to food.").

[102] FAO Guidelines on the Right to Food, 8.1; *see also* CESCR General Comment No. 12, para. 15.
[103] OHCHR, Special Rapporteur on the right to food, *available at* http://www.ohchr.org/EN/issues/food/Pages/FoodIndex.aspx.
[104] CESCR General Comment 12, para. 28.
[105] *Id*., para. 13.
[106] Report of the UN Special Rapporteur on the right to food, Addendum: Mission to Nicaragua, U.N. Doc. A/HRC/13/33/Add.5 (Dec. 8, 2009), *at* http://www.oda-alc.org/documentos/1341788678.pdf; *see also* UN Guidelines on Development-Based Evictions and Displacement, para. 6 (citing CESCR General Comments 4 and 7).
[107] General Comment 15, para. 3 (articulating the way in which the Committee on Economic, Social and Cultural Rights has interpreted ICESCR, art. 11(1)).
[108] *Id*., para. 2.
[109] *Id*., paras. 21, 23 and 25.

[that] States should initially direct resources and efforts towards meeting obligations with immediate effect, for example, targeting the realization of the core content of the human rights to water and sanitation without discrimination and *protecting existing access*."[110]

International law also recognizes the right to one's own means of subsistence.[111] The Inter-American Court of Human Rights has repeatedly recognized the implications of forcibly displacing indigenous people from their land on their right to life due to States' obligation to guarantee the conditions necessary for a dignified existence, which encompasses access to adequate food and ability to practice their means of subsistence.[112] For instance, in *Yakye Axa v. Paraguay*, the Court held that displacement of the indigenous people from their lands "caused special and grave difficulties to obtain food, primarily because the area where their temporary settlement is located does not have appropriate conditions for cultivation or to practice their traditional subsistence activities" undermining their right to life.[113]

In the case of Barro Blanco, forcing the Ngöbe from their land is incompatible with Panama's duties regarding the right to adequate food, water and means of subsistence. In the affected Ngöbe communities, much of the land in the flood area is lush, tropical forest – full of trees and plants that support the diet, health needs, and livelihoods of the people who live there. According to a UNDP-led expert assessment, people in the affected Ngöbe communities "live off farming the land, cultivating bananas, cassava, sugar cane, yams, taro root, rice, beans, corn, orange, coffee, pineapple, cocoa, [and] plantains, depending on the season," and keep domestic animals, such as pigs and chickens," "'bring[ing] very little food from outside [the indigenous land].'"[114] Members of the affected communities noted that they rely on the Tabasará River as the primary source of water for drinking, cooking, cleaning, and bathing.[115]

The Ngöbe's land is key to their means of subsistence. As the UNDP report explained, "[t]he tropical forest that exists along the riverbank of the Tabasará River provides an important source of vegetation,

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[110] Special Rapporteur on the human right to safe drinking water and sanitation, Sustainability and non-retrogression in the realisation of the rights to water and sanitation (July 11, 2013), para. 64, *at* http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session24/Documents/A-HRC-24-44_en.pdf (emphasis added).

[111] ICCPR, art. 1.2 provides "[a]ll peoples may, for their own ends, freely dispose of their natural wealth and resources… In no case may a people be deprived of its own means of subsistence."

[112] *See e.g., Case of Xákmok Kásek Indigenous Community v. Paraguay*, 2010 Inter-Am. Ct. H.R. (ser. C) No. 214, paras. 197-98, 202 (Aug. 24, 2010) (Paraguay's failure to provide adequate food to forcibly resettled indigenous people undermined their access to food and right to a dignified existence as part of their right to life); *Sawhoyamaxa*, para. 173 (Paraguay's failure to provide adequate food to forcibly resettled indigenous people contributed to its failure to guarantee their rights); *see also Sawhoyamaxa*, para. 230 (State to provide adequate food as part of reparations); *Yakye Axa*, paras. 164 and 167; *see also Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, Inter-Am. Ct. H.R., Judgment of June 27, 2012, Series C No. 245, para. 315 (discussing reparations for damage to natural resources: interference with indigenous peoples' access to their land affected "their ability to use and enjoy the resources on their territory…, particularly due to their restricted access to areas used for hunting, fishing and general subsistence.").

[113] *Yakye Axa*, paras. 164 and 167.

[114] UNDP Peritaje – Rural Diagnóstico Participativo, para. 51.

[115] Interviews by Abby Rubinson and Anouk Franck with members of the Ngöbe community, Kiad, Panamá (Nov. 2013) (on file with Earthjustice).

which serves a social and economic function."[116] "The majority of the products for their subsistence are provided by their own cultivation, domestic animals, and the environment in which they live. The local economy is based in subsistence and is produced only for consumption, with very little beyond that for sale."[117] The UNDP commented that the Ngöbe "repeatedly said that they do neither depend on nor receive assistance from the government: We eat and drink for survival, but not for making money, except to get things that we do not have like ham, medicine, salt, kerosene, and matches."[118]

Additionally, with the flooding of the tropical forest along the river, known as the Bosque de Galería, "natural resources like wood, medicinal plants, and other products used by the community will be lost."[119] "The Ngöbe communities use wood present in the Bosque de Galería … as construction material for their houses, their beds, and to construct boats, as well as for other minor uses."[120] Additionally, "[t]he Ngöbe communities make extensive use of medicinal plants present in the Bosque de Galería … [including] to cure headaches, stomachaches, fevers, and even as antidotes against venomous snakebites."[121] "The Bosque de Galería contains other products traditionally used by the Ngöbe community, … [like] different kinds of palms and other fibers used to make baskets and other traditional, as well as artisanal, products."[122]

Forced eviction will displace the Ngöbe from the bananas, cassava, sugar cane, yams, taro root, rice, beans, corn, orange, coffee, pineapple, cocoa, and plantains on which they rely for food,[123] jeopardizing both the availability and the accessibility of food. Forced eviction will also displace the Ngöbe from their primary source of water, the Tabasará River. Given that the Ngöbe's " local economy is based in subsistence" and that "[t]he majority of the products for their subsistence are provided by their own cultivation, domestic animals, and the environment in which they live,"[124] Panama's actions to forcibly evict the Ngöbe from their lands violate their rights to food, water and means of subsistence. Especially in light of the $4000 cash compensation provided for in the eviction notice, the Ngöbe have no guarantee that they will be able to access their means of subsistence and obtain food and water if they are evicted from their land.

4. <u>Panama is violating the Ngöbe's rights to culture and education by forcibly evicting them from their lands</u>

The right to culture is well established under international law, including in the International Covenants on Human Rights, American Declaration of the Rights and Duties of Man, and the UN Declaration on the

[116] UNDP Peritaje – Ecológico y Económico, para. 12.
[117] UNDP Peritaje – Rural Diagnóstico Participativo, para. 90.
[118] *Id*., para. 51.
[119] UNDP Peritaje – Ecológico y Económico, para. 16.
[120] *Id*., para. 103.
[121] *Id*.
[122] *Id*.
[123] *See* UNDP Peritaje – Rural Diagnóstico Participativo, para. 51.
[124] UNDP Peritaje – Rural Diagnóstico Participativo, para. 90.

Rights of Indigenous Peoples.[125] The UN Declaration specifically provides that "[i]ndigenous peoples and individuals have the right not to be subjected to … destruction of their culture," including protection from "[a]ny action which has the aim or effect of depriving them of their integrity as distinct societies, or of their cultural or ethnic characteristics or identities; … [and] [a]ny action which has the aim or effect of dispossessing them of their lands, territories or resources."[126]

The Inter-American Court of Human Rights has repeatedly recognized "the relationship of the indigenous groups with their territory … as crucial for their cultural structures and their ethnic and material survival."[127] As the Court explained in the seminal case *Awas Tingni v. Nicaragua*:

> [I]ndigenous peoples, as a matter of survival, have the right to live freely on their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, [their relationship with] the land is not merely a matter of possession and production but a material and spiritual element, which they must fully enjoy to preserve their cultural legacy and transmit it to future generations.[128]

Elaborating further on the connection between indigenous peoples' land and their culture, the Inter-American Court explained that the land is "closely linked to their oral expressions and traditions, their customs and languages, their arts and rituals, their knowledge and practices in connection with nature, culinary art, customary law, dress, philosophy, and values."[129]

Of particular relevance to the context of evictions, the Court has found that the "forced displacement of the indigenous peoples out of their community or from their members can place them in a special situation of vulnerability, that for its destructive consequences regarding their ethnic and cultural fabric, generates a clear risk of extinction and cultural or physical rootlessness of the indigenous groups."[130]

Given the close relationship between indigenous peoples' land and culture, Panama's forced eviction of the Ngöbe from their land violates their right to culture. The Ngöbe's culture is deeply rooted in their land, territory, and natural resources. As the UNDP-led expert assessment observed:

> Intangible impacts exist related to the culture of the Ngöbe communities and their form of traditional life. Among those that have been identified are the alteration of the Petroglyphs of

[125] *See* ICCPR, art. 27; ICESCR, art. 15(1); UNDRIP, art. 8; American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, art. XIII (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/I.4 Rev. 9 (2003);.
[126] UNDRIP, art. 8.
[127] *Case of Chitay Nech v. Guatemala*, Inter-Am. Ct. H.R., Judgment of May 25, 2010, Series C No. 212, para. 147; *see also Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R, Judgment of Jan. 31, 2001, Series C No. 79, para. 149; *Xákmok*, para. 86; *Yakye Axa*, para. 131; *Saramaka*, paras. 90, 96; *Sawhoyamaxa*, para. 118.
[128] *Awas Tingni*, para. 149.
[129] *Yakye Axa*, para. 154.
[130] *Chitay Nech*, para. 147.

> Quebrada Caña and Kiad.[131] … The Ngöbe populations maintain a cultural connection with those petroglyphs and consider them an important part of their historical and cultural heritage.[132]

The UNDP report further explained that the "cumulative changes in the characteristics and access to natural resources described can also have important consequences for the lifestyle and culture of the Ngöbe populations in the 3 communities."[133] "These populations are practically autonomous and self-sufficient owing to the natural resources their territory supplies. Any alteration to these resources will have repercussions on the culture of these populations."[134]

In addition, the Ngöbe's religion is deeply connected to their land and natural resources. As the UNDP report observed, "[t]he 3 communities are very religious and maintain a strong connection with nature, its resources, and a 'Dios Creador' represented in the Mama Tata religion. From this perspective, all of the elements and phenomena present in the communities appear to be naturally linked."[135]

As indigenous people, the Ngöbe have a serious concern that eviction from their land could "place them in a special situation of vulnerability" with potentially "destructive consequences" to their right to culture.[136] By virtue of the special relationship between indigenous peoples and their territory, the Ngöbe merit "special measures under international human rights law in order to guarantee their physical and cultural survival."[137] By forcibly evicting the Ngöbe from their lands and territories, Panama is contravening its duty to protect the Ngöbe's right to culture.

International law also protects the right to education, with specific protection for indigenous peoples' educational institutions. The UN Declaration on the Rights of Indigenous Peoples provides 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."[138] In addition, "States shall … take effective measures in order for indigenous individuals … to have access, when possible, to an education in their own culture and provided in their own language."[139] Because the Ngöbe's school for learning the Ngöbe language, religion, and culture is located on the land from which Mr. Miranda and his family will be evicted,[140] the flooding of Mr. Miranda's land will violate the right to education of not only Mr. Miranda and his family, but also all of the other Ngöbe community members who rely on this structure as a center for learning.

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[131] UNDP Peritaje – Ecológico y Económico, para. 18.
[132] *Id*., para. 112.
[133] *Id*., para. 18.
[134] *Id*., para. 112.
[135] UNDP Peritaje – Rural Diagnóstico Participativo, para. 4.
[136] *See Chitay Nech*, para. 147.
[137] *Saramaka*, paras. 90, 96.
[138] UNDRIP, art. 14(1).
[139] *Id. a*rt. 14(3).
[140] *See* UNDP Informe de la Misión de Verificación at 33 (noting flood area within 8 meters of the school); *see also* Peritaje – Hidráulica, para. 8.2.1 (noting that the flood area is higher than the previously established level of 103 meters above sea level).

B. Germany, the Netherlands, and the member States of CABEI have failed to take appropriate measures to prevent their respective banks' financing of the Barro Blanco project from violating the Ngöbe's human rights

"[D]evelopment-based evictions … include those supported by international development assistance."[141] Of the three development banks financing the Barro Blanco project, two are national development banks: the German Investment Corporation (DEG) and the Netherlands Development Finance Company (FMO). The third is the multilateral development bank Central American Bank for Economic Integration (CABEI).

In the context of forced evictions, the UN Guidelines provide that the "international community bears an obligation to promote, protect and fulfill the human right to housing, land and property."[142] Of particular relevance to Germany and the Netherlands with respect to their banks' financing of Barro Blanco: "States must formulate and conduct their international policies and activities in compliance with their human rights obligations, including through both the pursuit and *provision of international development assistance*."[143] Of particular relevance to the member States of CABEI, "[i]nternational financial, trade, development and other related institutions and agencies, including member or donor States that have voting rights within such bodies, should take fully into account the prohibition on forced evictions under international human rights law and related standards"[144] and "the obligations under international human rights and humanitarian law on the practice of forced eviction."[145]

Beyond their duty to ensure that human rights standards are integrated through development assistance, States should "ensure that international organizations in which they are represented refrain from sponsoring or implementing any project, programme or policy that may involve forced evictions, that is, evictions not in full conformity with international law."[146] According to the Maastricht Principles, "States must desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially," noting that State responsibility "is engaged where such nullification or impairment is a foreseeable result of their conduct."[147] The Maastricht Principles further describe States' obligations to respect, protect, and fulfill economic, social and cultural rights regarding such conduct, as well as to provide an effective remedy.[148] This includes indirect interference with a State or international organization's obligations to respect those rights, *e.g.*, where a State knowingly "aids … [or] assists … another State or international organisation to breach that State's or that international organisation's obligations" regarding those rights. This also includes indirect

[141] UN Guidelines on Development-Based Evictions and Displacement, para. 8.
[142] *Id*., para. 71.
[143] *Id*., para. 20 (emphasis added).
[144] UN Guidelines on Development-Based Evictions and Displacement, para. 71.
[145] Comm'n on Human Rights, Prohibition of forced eviction, Res. 2004/28 (Apr. 16, 2004), para. 6.
[146] UN Guidelines on Development-Based Evictions and Displacement, para. 27.
[147] Maastricht Principles, para. 13.
[148] *See id.* paras. 19-41.

interference with a State or international organization's obligation to protect those rights, *e.g.*, where a State has influence or control over the actor directly engaging in the conduct.[149]

According to the UN Guiding Principles on Business and Human Rights, endorsed by the Human Rights Council in its resolution 17/4, States should "set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations," including operations abroad.[150] The UN Guiding Principles further provide that States should "take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence."[151] The UN Guiding Principles' commentary makes clear that development agencies and development finance institutions fall within the scope of this principle, and notes that

> [w]here these agencies do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk – in reputational, financial, political and potentially legal terms – for supporting any such harm …. Given these risks, States should encourage and, where appropriate, require human rights due diligence by the agencies themselves and by those business enterprises or projects receiving their support.[152]

The UN Guiding Principles further note that "States, when acting as members of multilateral institutions that deal with business-related issues, should … [s]eek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights"; and "[e]ncourage those institutions, within their respective mandates and capacities, to promote business respect for human rights."[153] The UN Guiding Principles make clear that "where States participate in multilateral institutions that deal with business-related issues, such as international trade and financial institutions[,] States retain their international human rights law obligations."[154] By extension, these obligations should apply to States with respect to their national development banks.

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[149] *See id.* paras. 21, 25-26; *see also* Report of the Special Rapporteur on the right to safe drinking water and sanitation, U.N. Doc. A/68/264 (Aug. 5, 2013), para. 46; Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox , Preliminary Report, U.N. Doc. A/HRC/22/43 (Dec. 24, 2012), para. 48; UN Special Rapporteur on the right to food, Human rights beyond borders: UN experts call on world governments to be guided by the Maastricht Principles, Sept. 26, 2013, http://www.srfood.org/en/human-rights-beyond-borders-un-experts-call-on-world-governments-to-be-guided-by-the-maastricht-principles.

[150] Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011), princ. 2.

[151] *Id.* princ. 4.

[152] *Id.*, princ. 4, commentary.

[153] *Id.*, princ. 10.

[154] *Id.*, princ. 10, commentary.

The States of Germany and the Netherlands, and the member States of CABEO thus have clear human rights obligations in connection with their financing of the Barro Blanco project through their respective development banks. Beyond the "reputational, financial, political and potentially legal" risk their involvement poses, these States are obliged to ensure that their financial institutions do not restrain their duty to protect human rights.[155] Moreover, these States must "desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural rights extraterritorially" as a foreseeable result of their conduct.[156] In the context of Barro Blanco, this means that these States must not interfere directly or indirectly with the obligations of its respective development banks or of Panama to respect, protect, and fulfill economic, social and cultural rights.[157] This includes knowingly aiding or assisting its respective development banks or of Panama to breach their obligations regarding those rights, or to protect those rights, *e.g.*, where a State has influence or control over the actor directly engaging in the conduct.[158]

For the reasons described above, Germany, the Netherlands, and the member States of CABEI have failed to ensure that these banks are adhering to and adequately implementing human rights and due diligence policies in connection with their financing.

* * * * *

Given the gravity of threats to the Ngöbe's human rights posed by their imminent and forced evictions from their land, we call upon you to urge:

- **Panama** to suspend the eviction processes and dam construction until Panama has complied with international human rights obligations related to forced evictions, including the requirement to obtain indigenous peoples' free, prior, and informed consent before relocating them from their land; and

- **Germany and the Netherlands**, whose development banks are financing the project, and the **member States of CABEI**, a multilateral development bank that is financing the project, to halt disbursement of any remaining funds until each country has taken appropriate measures to ensure compliance with its obligations, including with respect to international development assistance, under international law.

[155] *See id.*, princ. 4, commentary.
[156] Maastricht Principles, para. 13.
[157] *See id.* paras. 19-41.
[158] *See id.* paras. 21, 25-26; *see also* Report of the Special Rapporteur on the right to safe drinking water and sanitation, U.N. Doc. A/68/264 (Aug. 5, 2013), para. 46; Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox , Preliminary Report, U.N. Doc. A/HRC/22/43 (Dec. 24, 2012), para. 48; UN Special Rapporteur on the right to food, Human rights beyond borders: UN experts call on world governments to be guided by the Maastricht Principles, Sept. 26, 2013, http://www.srfood.org/en/human-rights-beyond-borders-un-experts-call-on-world-governments-to-be-guided-by-the-maastricht-principles.

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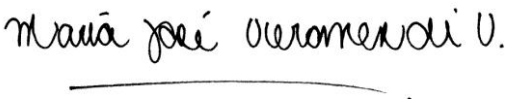

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