

HUMAN RIGHTS AND MIGRATIONS IN THE AMERICAS: REVISITING THE *DORZEMA ET AL VS DOMINICAN REPUBLIC CASE**

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Cet article propose d'abord une analyse des principes élaborés par les instances interaméricaines en ce qui a trait aux droits humains des personnes migrantes. Il aborde également le phénomène historique et socio-économique de discrimination qui prévaut en République Dominicaine à l'égard des Haïtiens ou des Dominicains d'origine haïtienne, et dans le cadre duquel se situe l'affaire *Nadège Dorzema*. Le texte aborde ensuite la stratégie et l'argumentaire juridique soumis à la Commission et la Cour interaméricaines des droits de l'Homme par les représentants des victimes pour démontrer que l'État a violé son obligation le droit à l'égalité de celles-ci. Les auteurs analysent enfin les conclusions de la Cour sur ces questions et abordent les difficultés anticipées dans la mise en œuvre du jugement.

This article first reviews the principles developed by the Inter-American institutions regarding the human rights of migrants. It also discusses the historical and socio-economic phenomenon of discrimination that prevails in the Dominican Republic against Haitians or Dominicans of Haitian origin, and in which the Case *Nadège Dorzema* took place. The text then discusses the strategy and legal arguments submitted to the Inter-American Commission and the Court of Human Rights by the victims' representatives to demonstrate how the State violated the former's right to equality. Finally, the authors analyse the Court's findings on these issues and address the difficulties anticipated regarding the implementation of the judgment.

Este artículo propone, en primer lugar, un análisis de los principios desarrollados por los órganos Interamericanos en cuanto a los derechos humanos de los migrantes. También se analiza el fenómeno histórico y socio-económico de discriminación existente en República Dominicana en perjuicio de los personas haitianas o dominico-haitianas, y en el cual se inscribe el caso *Nadège Dorzema*. A continuación, el texto analiza la estrategia y los argumentos jurídicos presentados a la Comisión y la Corte Interamericana de Derechos Humanos por parte de los representantes de las víctimas a fin de demostrar que el Estado ha violado su obligación de respetar el derecho a la igualdad. Por último, los autores analizan las conclusiones del Tribunal sobre estas cuestiones y abordan las posibles dificultades en la ejecución de la sentencia.

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Migrations are at the heart of current debates regarding the development of International Human Rights Law¹. This issue embodies the powerful tensions, which persist between the concept of State sovereignty and the principle of full respect for human dignity without any discrimination based on ethnic, national or social origin, both governed by International Law². These issues are especially relevant today, as globalization promotes the mobility of workers and their families³, and as governments strengthen their security apparatus to face international terrorism⁴.

In Europe, the challenges posed by migration policies are of the utmost relevance, especially in the political and legal spheres⁵. For example, in a recent decision, *Hirsi Jamaa and al v Italy*⁶, the European Court of Human Rights (hereinafter ECHR) condemned Italy for violating the rights of a group of migrants intercepted at sea and pushed back to Libya, where they were at risk of ill-treatment. Having concluded that Italy conducted a collective expulsion, the Court held that "[...] the applicants were deprived of any remedy which would have enabled them to lodge their complaints [...] with a competent authority and to obtain a thorough and rigorous assessment of their requests before the removal measure was enforced"⁷. It ruled that Italy's actions were in violation of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*⁸ and of the *Protocol No. 4* which notably addresses collective expulsions⁹.

¹ See, eg, Michael Puechavy & Frederic Krenc, *Migrations de populations et droits de l'homme – Cours thématiques de la session d'enseignement de juillet 2007 de l'Institut international des droits de l'homme* (Brussels: Bruylant, Collection Law and Justice, 2011). See also Alice Edwards & Carla Ferstman, *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge: Cambridge University Press, 2010).

² In the Inter-American System for the protection of Human Rights, these legal concepts are reflected in the *Charter of the Organization of American States*, OR OEA/A-41/ NOS 1-C AND 61,(1948) at 2 & 3, as well as in the *American Declaration of the Rights and Duties of Man* (1948), at II; and the *American Convention on Human Rights "Pact of San José, Costa Rica"*, OR OEA/B-32/NO 36 (1969) at 1 & 24 [*American Convention on Human Rights*].

³ See for example François Crépeau, Delphine Nakache & Idil Atak, *Les migrations internationales contemporaines – Une dynamique complexe au cœur de la globalisation* (Montreal: University Press of Montreal, 2009).

⁴ See in particular OAS, Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OR OEA/Ser.L/V/II.116, Doc. 5 rev. 1 (2002) [*Report on Terrorism*].

⁵ See, for example, Council of Europe, Committee of Ministers, *Cadre relatif aux travaux du Conseil de l'Europe dans le domaine des migrations 2011-2013*, SG/Inf(2011)10 (which created a new division of Coordination on migration within the Council of Europe).

⁶ *Hirsi Jamaa and Others v Italy* [GC], No 27765/09, [2012] ECHR, 97, online: European Court of Human Rights <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx>>.

⁷ *Ibid.*, at para 205.

⁸ *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 at 223, Eur TS 5 [ECHR] at 3 and 13.

⁹ *Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto*, 16 September 1963, CETS 046, Eur TS [ECHR] at 4, online: Council of Europe <<http://conventions.coe.int/Treaty/en/Treaties/Html/046.htm>>.

In the Americas, the question of migration is one of the key issues of domestic and foreign policy of the States¹⁰. One can refer, for example, to the economic and security challenges posed by the increasing migration of workers from Mexico and Central America towards the United States¹¹, or from States with weaker economies (Peru, Bolivia, Paraguay) to the wealthier States in the Southern Cone (Argentina, Chile, Brazil)¹². While the area once encouraged immigration for economic development and colonization¹³, and although it is still essential to the economies of many countries, numerous States have adopted and continue to adopt measures to restrict or control migration flows and to limit access to their territories. In this context, it is feared that such actions would have the effect of marginalizing certain groups of the population, in violation of the right to equality guaranteed by the Inter-American Human Rights Law¹⁴.

In this regard, the Special Rapporteur on the Rights of Migrants of the Organization of American States (hereinafter OAS) recently reported:

It is extremely concerning that in the current context, some States take measures that focus on the criminalization of irregular migration and adopt laws that directly contradict the rights of migrants, and even more, allow the use of racial profiling during immigration control procedures. Regardless of immigration status, migrants, just like any other person, have human rights that all States have the obligation to respect and guarantee. Within any immigration control procedure, States are obliged to guarantee that their authorities respect the right to life and physical and psychological integrity of migrants who are under their jurisdiction, regardless of their immigration status¹⁵.

¹⁰ See, for example, OAS, General Assembly, *Poblaciones migratorias y Flujos de migración en las Américas*, OR OEA/Ser.P/AG/doc. 5124/10 (2010); OAS, *Migración internacional en las Américas: Primer informe del Sistema Continuo de Reportes de Migración Internacional en las Américas (SICREMI 2011)*, OR OEA/Ser.D/XXVI.2 (2011), online: OAS, SICREMI <http://www.migracionoea.org/sicremi/documentos/SICREMI_2011_ENGLISH.pdf> [SICREMI 2011].

¹¹ *Ibid* at 60-61.

¹² *Ibid* at 64. See also *Panorama Social de América Latina 2011*, UNCEPAL, UN Doc LC/G.2514-P, (2011) at 44, online: CEPAL <<http://www.eclac.cl/publicaciones/xml/1/45171/PSE2011-Panorama-Social-de-America-Latina.pdf>>.

¹³ See in this regard Benjamin Keen, Robert Buffington & Lila Caimari, *Latin American Civilization: History and Society, 1492 to the Present* (Boulder, Colorado: Westview Press, 2000).

¹⁴ On this point see Bernard Duhaime, "Vers une Amérique plus égalitaire? L'interdiction de la discrimination et le système interaméricain de protection des droits de la personne", in Ludovic Hennebel & Helene Tigroudja, eds, *Le particularisme interaméricain des droits de l'homme* (Paris, Pedonne: Éditions A. Pedone, 2009) at 151 [Duhaime, *Vers une Amérique plus égalitaire*]. See also Ariel E. Dulitzky, "El principio de Igualdad y No discriminación. Claroscuros de la jurisprudencia interamericana" (2007) 2 *Anuario de derechos humanos* 15, online: University of Chile <<http://www.anuariodh.uchile.cl/index.php/ADH/ishttp://www.anuariodh.uchile.cl/index.php/ADH/isue/view/1131sue/view/1131>>. See also Anne F. Bayefsky, "The non-discrimination principle of equality or in international law" (1990) 11 *HRLJ* 11.

¹⁵ OAS, Inter-American Commission on Human Rights, *IACHR Condemns the recent death of Mexican national by U.S. Border Patrol Agents*, OR Press Release no 93/12, (2012), online: Organization of American States <http://www.oas.org/en/iachr/media_center/PReleases/2012/093.asp>.

In the OAS System, the Inter-American Commission and the Inter-American Court of Human Rights (hereinafter Commission or IACHR, and Court or IACourt HR or IACtHR, respectively) have addressed the issue of human rights of migrants repeatedly, developing a rich and innovative jurisprudence. However, these bodies have discussed the matter primarily in terms of the victims' right to judicial protection and judicial guarantees¹⁶, addressing the issue of the right to equality and non-discrimination of migrants mainly in a theoretical manner¹⁷.

However, in October 2012, the Inter-American Court of Human Rights issued a judgment in *Nadège Dorzema and al v Dominican Republic*¹⁸. This case deals with the massacre and deportation of a group of Haitian migrants by the Dominican armed forces. In this international judicial process, the victims' representatives argued that the Court should conclude that these actions were discriminatory.

This paper will first address various principles of Inter-American Human Rights Law developed by the Commission and the Court in the context of migrations. It will then discuss the more specific question of the right to equality of migrants in the Dominican Republic through a study of the *Dorzema* case¹⁹ (sometimes also called the case of the Guayubin Massacre) and through an analysis of the arguments offered by the victims on this issue.

I. The Inter-American Human Rights System and the Phenomenon of Migration

In 1948, the States of the Americas created the Organization of American States²⁰ based on various principles reaffirming the importance of "fundamental rights

¹⁶ See *American Convention on Human Rights*, *supra* note 2 art 8 and 25.

¹⁷ See in particular *Juridical Condition and Rights of Undocumented Migrants* (2003), Advisory Opinion OC-18/03, Inter-Am Ct HR (Ser A) No 18, online: Inter-American Court of Human Rights <http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf> [*Juridical Condition and Rights*].

¹⁸ See *Nadège Dorzema and al v Dominican Republic* (2012), Inter-Am Ct HR (Ser C) No 251, online: Inter-American Court of Human Rights <http://www.corteidh.or.cr/docs/casos/articulos/seriec_251_ing.pdf> [*Nadège Dorzema v Dominican*]. See also *Nadège Dorzema and al or "Massacre Guayubín" v Dominican Republic* (2008), Inter-Am Comm HR, No 95/08, online: IACHR <<http://www.cidh.oas.org/annualrep/2008sp/RepDominicana1351-05.sp.htm>> [*Nadège Dorzema or Case Dorzema*]. See also OAS, Inter-American Commission on Human Rights, *IACHR Takes Case Involving the Dominican Republic to the Inter-American Court*, OR Press Release No 12/11 (2011), online: Organization of American States <http://www.oas.org/en/iachr/media_center/PReleases/2011/012.asp>; UQAM, "La CIDDHU défendra le cas « Nadège Dorzema et al. c. République Dominicaine » à la Cour interaméricaine des droits de l'homme", News (June 21, 2012), online: University of Quebec at Montreal, <<http://www.nouvelles.uqam.ca/2012/2228-ciddhu-bernard-duhaime-defendront-cas-nadège-dorzema-al-c-republique-dominicaine-cour>>.

¹⁹ *Ibid.*

²⁰ The Organization of American States is a regional international organization within the meaning of Article 52 of the Charter (*Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7. [UN Charter]). The following States are members of the OAS: Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Cuba, Dominica, Ecuador, El Salvador, United States, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua,

of the individual without distinction as to race, nationality, creed, or sex"²¹. A regional system of human rights regime was gradually developed, composed by a set of norms and institutions for the promotion and protection of human rights²². The main legal instruments in the field are the *OAS Charter*²³, the *American Declaration of the Rights and Duties of Man*²⁴ (hereinafter *Declaration*) and the *American Convention on Human Rights*²⁵ (hereinafter *Convention* or *American Convention*), as well as various thematic treaties²⁶. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights are the two main agencies entrusted with promoting and protecting human rights in the hemisphere. Both refer to the General Assembly of the OAS.

The Commission is composed of seven independent experts (commissioners), elected by the General Assembly from a list submitted by the OAS member States. As the main advisory body of the OAS in the field of human rights, the Commission has a variety of functions²⁷ such as the observation of specific situations, including during on-site visits, and the publication of thematic reports or reports on the situation of human rights in a specific country, etc. In addition, the Commission receives and processes individual petitions that it receives²⁸. In this context, the IACHR makes recommendations to States and may transfer some contentious cases to the Inter-American Court²⁹. It is worth mentioning that, in the course of its duties for the promotion and protection of human rights, the Commission decided in 1996 to appoint one of its members as Special Rapporteur on Migrant Workers and their Families. The latter is assisted by a small secretariat, funded in part by voluntary contributions from some States. The Special Rapporteur's mandate was expanded in 2012 to cover the broader phenomenon of migrations³⁰. As part of its function to monitor the situation of migrants and to make recommendations thereon to

Panama, Paraguay, Peru, Dominican Republic, St. Kitts and Nevis, Saint Vincent and the Grenadines, St. Lucia, Suriname, Trinidad and Tobago, Uruguay and Venezuela.

²¹ *Charter of the Organization of American States*, *supra* note 2 at 3(l).

²² For an overview of the Inter-American System of Human Rights Protection, see Bernard Duhaime, "Protecting Human Rights in the Americas: recent achievements and challenges" in Gordon Mace, Jean-Philippe Thérien & Paul Haslam, eds, *Governing the Americas: Regional Institutions at the Crossroads* (Boulder: Lynne Rienner Publishers, 2007) at 131.

²³ *Charter of the Organization of American States*, *supra* note 2.

²⁴ *American Declaration of the Rights and Duties of Man*, *supra* note 2.

²⁵ *American Convention on Human Rights*, *supra* note 2.

²⁶ See generally, OAS, Inter-American Commission on Human Rights, *Basic Documents Pertaining to Human Rights the Inter-American System*, OR OEA/Ser.L/V/1.4 rev. 8 (2001), online: Organization of American States <http://www.oas.org/en/iachr/mandate/basic_documents.asp>.

²⁷ *American Convention on Human Rights*, *supra* note 2 at 41.

²⁸ The Commission has received an average of about 1,425 petitions annually between 2006 and 2010. See OAS, Inter-American Commission on Human Rights, *Strategic Plan 2011-2015*, (2011) at 20, online: Organization of American States <<http://www.oas.org/en/iachr/docs/pdf/IACHRStrategicPlan20112015.pdf>>.

²⁹ OAS, Inter-American Commission on Human Rights, 137d Sess, *Rules of Procedure of the Inter-American Commission on Human Rights*, (2009) at 45, online: Organization of American States <<http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp>>.

³⁰ OAS, Inter-American Commission on Human Rights, *Mandate of the Rapporteurship on the Rights of Migrants* online: Inter-American Commission on Human Rights <<http://www.cidh.org/Migrantes/migrants.background.htm>>.

the States, the Office of the Special Rapporteur has made numerous on-site visits, initiatives to collect information and several thematic studies³¹ or reports on the situation of migrants in specific countries³². This office also supports the Commission in the processing of individual petitions dealing with the human rights of migrants.

The Court is also composed of seven independent experts (judges) elected by the General Assembly of the OAS. Its headquarters are located in San José, Costa Rica. Member States should have ratified the Convention and explicitly recognized the compulsory jurisdiction of the Court to allow it to rule on individual cases concerning their country³³. When a contentious case is referred to its jurisdiction, the Court issues decisions (or judgments), which are binding for the States, in accordance with International Law. Moreover, the Court may issue advisory opinions at the request of States, the Inter-American Commission or other authorized bodies³⁴. The Court's advisory functions enable it to interpret the Convention or any other Inter-American treaty related to human rights and also to assess the compatibility of domestic standards with the Inter-American Human Rights Law. Finally, in serious and urgent cases, the Court may also order provisional measures³⁵.

These two bodies have inevitably adopted a series of important decisions dealing with the protection of human rights in the context of migrations. The Inter-American Commission issued a number of resolutions³⁶ analyzing the matter

³¹ In particular regarding the economic consequences of migration, on the issue of smuggling of migrants and of human trafficking, on discrimination, racism and xenophobia, on judicial guarantees and conditions of detention of migrants, as well as on the practices of OAS member States in the field of migration. See <http://www.cidh.org/Migrantes/migrantes.thematic.htm>

³² United States (1998, 2011), Canada (2000), Guatemala (2003), Costa Rica (2003) & Mexico (2003). See <http://www.cidh.org/Migrantes/migrantes.countryreports.htm>

³³ Countries that have ratified the *American Convention* are: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname, Uruguay and Venezuela.

³⁴ *American Convention on Human Rights*, *supra* note 2 at 64.

³⁵ *Ibid* at 63(2).

³⁶ Although the Commission's resolutions are not binding *stricto sensu* as a matter of public international law, they are recommendations that States must follow in good faith and which contribute to the establishment of standards. See in particular *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights* (1989), Advisory Opinion 10/89, Inter-Am Ct HR (Ser A), No 10 at para 29-47 [Opinion No 10]; *Report on Terrorism*, *supra* note 4 at 39; *James Terry Roach and Jay Pinkerton v United States* (1987), Inter-Am Comm HR Case 9647 or No 3/87 at para 46-49, online: Inter-American Commission on Human Rights < <http://www.cidh.oas.org/annualrep/86.87eng/EUU9647.htm> > ; *Michael Edwards et al v The Bahamas* (2001), Inter-Am Comm Hr Case 12.067 or No 48-01 at para 107, online: Inter-American Commission on Human Rights < <http://cidh.org/annualrep/2000eng/ChapterIII/Merits/Bahamas12.067.htm> >. See also OAS, General Assembly, 8d Sess, *Proceedings Volume I, Certified Texts of the Resolutions*, OR OEA/Ser.P/VIII-0.2 (1978) at AG/RES. 370 (VIII-0/78); General Assembly, 7d Sess, *Proceedings Volume I, Certified Texts of the Resolutions*, OR OEA/Ser.P/VII-O.2

primarily in terms of the right to judicial guarantees and judicial protection to be provided to migrants in the context of judicial and administrative processes, including the respect of their right to consular protection. Thus, the IACHR held that when a foreigner is arrested, detained or taken into custody, they must be informed of their right to seek the consular protection of their country of origin³⁷. This principle, although not expressly contained in the *American Declaration* or the *American Convention*, stems from the interpretation of these instruments in light of Article 36 of the *Vienna Convention on Consular Relations*³⁸ (hereinafter *Vienna Convention*). The Commission stated that the right to consular protection is essential to ensure the right of migrants to a fair trial, which should be guaranteed to every person in the territory of the State concerned, regardless of their immigration status³⁹. This interpretation was also adopted by the International Court of Justice of the United Nations in its decision on the *LaGrand* case (*Germany v United States of America*)⁴⁰ and the Inter-American Court of Human Rights in its *Advisory Opinion No 16*⁴¹, which deals specifically with the right to consular assistance. Both the Inter-American Commission and the Inter-American Court of Human Rights pointed out that, in the case of persons sentenced to death, non-compliance with Article 36 of the Vienna Convention could also constitute an arbitrary deprivation of life contrary to International Law⁴².

The Commission also had the opportunity to rule on asylum and the safeguards that must be followed in proceedings dealing with such requests. Thus, in its *Report on the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, the Commission stated that “While the right to seek asylum contained in Article XXVII implies no guarantee that it will be granted, it

(1977) at AG/RES. 314 (VII-0/77) and OAS, General Assembly, 31d Sess *Proceedings Volume I, AG/DEC. 25 - AG/DEC. 26 (XXXI-O/01) AG/RES. 1765 - AG/RES. 1839 (XXXI-O/01) Certified Texts of the Resolutions*, OR OEA/Ser.P/VII-O.2 (2001) at AG/RES. 1829 (XXXI-0/01).

³⁷ See in particular *Medellín Ramírez Cardenas and Leal García v United States* (2009), Inter-Am Comm HR, Case 12.644 or No 90/09, online: Inter-American Commission on Human Rights <<https://www.cidh.oas.org/annualrep/2009eng/US12644eng.htm>>; *Roberto Moreno Ramos v United States* (2005), Inter-Am Comm HR, Case 11.430 or No 1/05, online: Inter-American Commission on Human Rights <<http://www.cidh.org/annualrep/2005eng/USA.12430eng.htm>>; *Javier Suarez Medina v United States* (2005), Inter-Am Comm HR, Case 12.421 or No 91/05, online: <<http://www.cidh.oas.org/annualrep/2005eng/USA.12421eng.htm>>; *Cesar Fierro v United States* (2003), Inter-Am Comm HR, Case 11.331 or No 99/03, online: Inter-American Commission on Human Rights <<http://www.cidh.oas.org/annualrep/2003eng/USA.11331.htm>>; *Ramón Martínez Villareal v United States* (2002), Inter-Am Comm HR, Case 11.753 or No 52/02, online: Inter-American Commission on Human Rights <<http://www.cidh.oas.org/annualrep/2002eng/USA.11753.htm>> [*Ramon v USA*].

³⁸ *Vienna Convention on Consular Relations*, April 24 1963, 596 UNTS 261 (entered into force: 16 March 1967).

³⁹ *Ramón v USA*, *supra* note 37 at para 64.

⁴⁰ *LaGrand Case (Germany v US)* [2001] ICJ Rep 466.

⁴¹ *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the due Process of Law* (1999), Advisory Opinion OC-16/99, Inter-Am Ct HR (Ser A) No 16, online: Inter-American Court of Human Rights <http://www.corteidh.or.cr/docs/opiniones/seriea_16_ing.pdf> [*Opinion No 16*].

⁴² *Ramón v USA*, *supra* note 37 at para 70 and, *Opinion No 16*, *supra* note 41 at para 136.

necessarily requires that the claimant be heard in presenting the application”⁴³. The Commission then stated that the right to seek asylum requires the ability to present a demand. This demand has to be heard by a competent entity which will determine whether the conditions established by national legislation applicable to the granting of refugee status are encountered⁴⁴. This determination must be an individual examination of the applicant's situation, including an assessment of the risks to which the latter could be exposed in its country of origin, in accordance with the principle of *non-refoulement*⁴⁵. Similarly, in its *Report on Immigration in the United States: Detention and Due Process*⁴⁶, the IACHR had the opportunity to develop several standards related to the detention of non-citizens, as well as judicial guarantees that must be met in immigration proceedings.

These standards confirm the principles established by the Commission a few years ago, in many individual cases, including the *Haitian Interdiction* case⁴⁷ concerning the interception of Haitian boat refugees who had been summarily repatriated to Haiti by the United States Coast Guard. The victims had not been entitled to a proper consideration of their individual circumstances or to an interview to determine if they met the criteria for the granting of refugee status. The Commission had concluded that the United States had violated the victims' right to access the courts in order to ensure the respect of their rights guaranteed by the *American Declaration*⁴⁸.

As to the *Wayne Smith, Hugo Armendariz v United States* case⁴⁹, it dealt with the situation of legal permanent residents in the United States facing a deportation order without having the possibility to submit a judicial appeal⁵⁰. The Commission then reiterated the importance for administrative and judicial bodies to pronounce an individualized decision. This decision needs to be issued in accordance with the right to judicial guarantees provided for under International Human rights Law, despite the general power of States to legislate on migration⁵¹. In addition, the IACHR, in

⁴³ OAS, Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of Asylum Seekers Within the Canadian Refugee Determination System*, OR OEA/Ser.L/V/II Doc.40, rev 106 (2000) at para 60 [*Report on Canada*].

⁴⁴ *Ibid* at 68 and OAS, Inter-American Commission on Human Rights, *John Doe et al v Canada*, Report No 78/11, Case 12.586 (2011), at para 92, online: OAS <www.oas.org/en/iachr/decisions/2011/CAPU12586EN.DOC>; See also OAS, Inter-American Commission on Human Rights, *The Haitian Center for Human Rights et al v United States*, Report 51/96, Case 10.675 (1997), at para 163, online: Inter-American Commission on Human Rights <<http://www.cidh.oas.org/annualrep/96eng/USA10675.htm>> [*Haitian Interdiction case*].

⁴⁵ *Ibid* at para 111 and *Report on Canada*, *supra* note 43 at para 25.

⁴⁶ OAS, Inter-American Commission on Human Rights, *Report on Immigration in the United States: Detention and Due Process*, OR OEA/Ser.L/V/II, Doc. 78/10 (2010)

⁴⁷ *Haitian Interdiction case*, *supra* note 44.

⁴⁸ *Ibid* at 180.

⁴⁹ *Wayne Smith, Hugo Armendariz v United States* (2010), Inter-Am Comm, Report 81/10, Case 12.562, online: Inter-American Commission on Human Rights <<http://www.cidh.oas.org/annualrep/2010eng/USPU12562EN.doc - 01/24/2012>> [*Smith and al v USA*].

⁵⁰ Indeed, according to the *Illegal Immigration Reform and Immigrant Responsibility Act (1996)* and the *Antiterrorism and Effective Death Penalty Act (1996)*, this type of mandatory deportation without appeal was allowed following a conviction for a "serious offense."

⁵¹ *Smith and al v USA*, *supra* note 49 at para 49-50.

accordance with the recommendations of several international organizations, stated that when a judicial decision on migration may result in the separation of families, the national judicial authorities must establish a balance between, on the one hand, the legitimate interests of the State to protect and promote the general welfare of the population, and, on the other hand, the fundamental rights of non-citizen residents, including the right to family life, taking into account the best interests of their children, if applicable⁵².

The *Andrea Mortlock v United States* case⁵³, meanwhile, concerned the same type of deportation order (resulting from a conviction for an offense) dealing with a permanent resident. In this case Ms. Mortlock was suffering from acquired immunodeficiency syndrome (AIDS). The IACHR indicated that the deportation of a person in these circumstances could correspond to a cruel, infamous and unusual punishment contrary to the *American Declaration*⁵⁴.

Finally, it should be noted that the Commission had the opportunity to tackle, on two occasions, the specific question of the scope of the right to equality and non-discrimination regarding migrants. First, in the *Haitian Interdiction* case mentioned above, the Commission considered that the United States had violated the victims' right to equality before the law because the immigration authorities had granted Haitian boat peoples a distinct treatment compared to the one reserved for Cuban citizens (or other nationalities) in similar situations⁵⁵. Subsequently, the IACHR adopted the *Mazzora Rafael Ferrer and al v United States* case⁵⁶, which dealt with the arrival of nearly 125,000 Cubans part of the "*Flotilla Libertad*"⁵⁷. Some of these people had been detained since their arrival in the United States on different grounds prohibiting their entry into the territory. They were still held at the time of the presentation of the petition before the IACHR in 1987. Their detention was subject to revision by US authorities every twelve-months, a time frame the Commission considered to be excessive⁵⁸. In addition, the IACHR stated that, in the particular context of migration, although it is normal and appropriate for States to grant a different treatment to foreigners, every State has the burden of proving that any distinction or difference in treatment is reasonable and proportionate to the objective sought⁵⁹. The Commission concluded that the US did not meet that

⁵² *Ibid* at para 51 and 56.

⁵³ *Andrea Mortlock v United States* (2008), Inter-Am Comm HR, Report No 63/08, Case 12.534, online: Inter-American Commission on Human Rights <<http://www.cidh.oas.org/annualrep/2008eng/USA12534eng.htm>>.

⁵⁴ *Ibid* at para 94, where the IACHR stated: "[s]ending Ms. Mortlock to Jamaica with the knowledge of her current health care diet and the country's sub-standard access to similar health for those with HIV/AIDS would violate Ms. Mortlock's rights, and would constitute a *de facto* sentence to protracted suffering and unnecessarily premature death."

⁵⁵ *Haitian Interdiction case*, *supra* note 44 at para 177.

⁵⁶ *Rafael Ferrer-Mazorra and al v USA* (2001), Inter-Am Comm HR, Report No 51/01, Case 9903, online: Inter-American Commission on Human Rights < *Mazzora Rafael Ferrer and al. v U.S.*> [*Ferrer and al v USA*].

⁵⁷ Also known as the Mariel Cubans.

⁵⁸ *Ferrer and al v USA*, *supra* note 56 at para 230.

⁵⁹ *Ibid* at para 241.

requirement in this case.

The Inter-American Court, for its part, focused on the specific issue of the rights of migrants in two advisory opinions. First, the Court reaffirmed the standards regarding the *Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* in its *Advisory Opinion No 16*⁶⁰ mentioned above. Moreover, it has also conducted further analysis of the equality rights of migrants in the framework of the *Advisory Opinion No 18 on the Juridical Condition and Rights of the Undocumented Migrants*⁶¹. Thus, the Court noted that the two interrelated principles of equality and non-discrimination⁶² are “fundamental for the safeguard of human rights in both international and domestic law”⁶³. Moreover, the Court stated that the right to equality is a norm of *jus cogens*⁶⁴ and carries obligations of an *erga omnes* nature under International Law⁶⁵. It should also be noted that, in this opinion, the Court has expanded the list of prohibited grounds of discrimination specifically enumerated in the Convention⁶⁶, adding, “nationality”, “age”, “property” and “civil status” as new grounds, and replacing “social status” by the broader term “other status”⁶⁷. Moreover, the Court recognized the special condition of vulnerability of migrants, indicating that it has an “ideological dimension and occurs in a historical context that is distinct for each State and is maintained by de jure (inequalities between nationals and aliens in the laws) and de facto (structural inequalities) situations”⁶⁸. The Court finally noted that “States may not subordinate or condition the observance of the principle of equality before the law and non-discrimination to achieving the goals of its public policies, whatever these may be, including those of a migratory nature”⁶⁹.

In addition to these advisory opinions, the Court has also adopted a set of principles concerning the fundamental rights of migrants in the context of migration control and detention with the *Tranquilino Vélez Loor v Panama* case⁷⁰. Mr. Vélez Loor, an Ecuadorian citizen who was detained because he did not have the necessary documents to remain in the country, was tortured and then released. As part of its analysis, the Court first noted the situation of vulnerability which migrants generally face, and reiterated the need for States to adopt special measures to ensure the rights

⁶⁰ *Supra* note 41.

⁶¹ *Opinion No 18, supra* note 17. For an analysis of this decision, see Duhaime, *Vers une Amérique plus égalitaire, supra* note 14.

⁶² *Opinion No 18, supra* note 17 at 85.

⁶³ *Ibid* at 88.

⁶⁴ *Ibid* at 101.

⁶⁵ *Ibid* at 110.

⁶⁶ *American Convention on Human Rights, supra* note 2 at 1: The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

⁶⁷ Duhaime, *Vers une Amérique plus égalitaire, supra* note 14. See also Dulitzky, *supra* note 14.

⁶⁸ *Opinion No 18, supra* note 17 at para 112.

⁶⁹ *Ibid* at para 172.

⁷⁰ *Vélez Loor v Panama* (2010), Inter-Am Ct HR (Ser C) No 218, online: Inter-American Court of Human Rights <http://www.corteidh.or.cr/docs/casos/articulos/seriec_218_ing.pdf> [*Loor v Panama*].

of those persons⁷¹. It reaffirmed the importance of ensuring their full right to judicial protection and judicial guarantees regardless of their immigration status⁷². With respect to the ability of States to establish punitive sanctions in case of violation of immigration laws⁷³, the Court concluded that “criminalizing an irregular entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary detention” and disproportionate measures⁷⁴.

Finally, since the early 2000s, various organizations of civil society presented to the IACHR a series of complaints against the Dominican Republic on the rights of Haitian migrants and people of Haitian origin, including through the *Dorzema and al* case.

II. The Right to Equality of Haitians and People of Haitian Descent in the Dominican Republic

Because this paper addresses the issue of State discrimination against Haitians and people of Haitian descent in the Dominican Republic, it will briefly address the historical, economic and social context that underlies these alleged violations.

Many consider that the "antihaïtianisme" phenomenon emerged in the Dominican Republic in the colonial era and at the time of the struggle for independence. During this time, for a short period, the eastern part of the island of Hispaniola was occupied by the Haitian army⁷⁵. However, it is under the regimes of President Trujillo (1930-1960) and his successor Balaguer (1960-1996) that strong anti-Haitian policies have been developed⁷⁶. These policies have had a significant impact on the collective consciousness and legitimized racist and intolerant attitudes both within Dominican society and among Dominican officials. The discrimination and harsh conditions imposed on Haitian migrant workers and their families have led to the marginalization of the Haitian community in the country. This, in turn, was relayed in precarious working conditions and sub-standard salaries, and continues to

⁷¹ *Ibid* at para 98.

⁷² *Ibid* at para 142.

⁷³ *Ibid* at para 163.

⁷⁴ *Report of the Working Group on Arbitrary Detention*, UNHRC, 7th sess, UN Doc A/HRC/7/4 (2008) at para 53 cited in *Loor v Panama*, *supra* note 70 at para 169.

⁷⁵ In 1804, Haiti, a country mainly populated by slaves freed itself from French colonial rule by defeating the armies of Napoleon. The army of the new Haiti subsequently invaded what is now the Dominican Republic, to release it from the Spanish crown. See Human Rights Watch, *Personas Ilegales: Haitianos y dominico-haitianos en la República Dominicana* (2002), vol 14, no 1(B), at 7-8, online: Human Rights Watch <<http://www.hrw.org/en/reports/1992/04/01/personas-ilegales>> [*Human Rights Watch*].

⁷⁶ Trujillo was a particularly strong defender of national identity and promoted antihaïtien stereotypes resumed later by Balaguer and which still exist today. It is Balaguer who initiated the practice of deportation of Haitians. *Ibid* at 9 and 17.

contribute to the country's prosperity⁷⁷.

The plight of Haitians and people of Haitian descent, as well as the inaction of the Dominican government in the fight against discrimination, have been criticized by several international organizations⁷⁸. Nevertheless, the Dominican government continues to deny the presence of any form of racism in the country⁷⁹. In addition, the Dominican State often discusses the "Haitian problem" on its territory by reference to concepts of "racial purity" and "genetic characteristics"⁸⁰. These expressions perpetuate the "anti-haitianism" forged by the Dominican nationalists after independence, on the basis of cultural and racial differences between Haitians ("blacks") and Dominicans ("hispanics"), a distinction which does not take into account the diversity of the country⁸¹ and the reality of migration.

It is worth mentioning that the broader issue of discrimination and the "anti-haitianism" phenomenon in Dominican Republic fall specifically within a classic pattern of economic and social migration. Indeed, the conditions of extreme poverty in Haiti have led many of its inhabitants to leave the country in search for better opportunities. Simultaneously for several years, the Dominican economy has absorbed the migrant population to respond to the demand for labour in certain sectors of activity.

The first migration of Haitians to the Dominican Republic, motivated by the demand for agricultural labor in the sugar industry, took place during the first third of

⁷⁷ *Ibid* at 9.

⁷⁸ See for example: *Examen de los Informes Presentados por los Estados Partes de Conformidad con el Artículo 9 de la Convención, Observaciones finales del Comité para la Eliminación de la Discriminación Racial, República Dominicana*, UNCERD, 72d Sess, CERD/C/DOM/CO/12, (2008) [UNCERD, *Observaciones finales para Eliminación*]; *Informe nacional presentado de conformidad con el párrafo 15 A) del anexo a la resolución 5/1 del consejo de derechos humanos : República Dominicana*, UNHRC, 6th Sess A/HRC/WG.6/6/DOM/1 (2009) at 8.

⁷⁹ For example, in 1999, the Dominican State indicated to the UN Committee on the Elimination of Racial Discrimination that "[...] racial prejudice does not exist, but regardless, there is the possibility that some individuals within the country can maintain such prejudice, this does not prove their existence and does not validate the claim that Haitians who leave in the country are victims of discrimination [our translation] « [c]abe señalar la inexistencia de prejuicio racial, con independencia de que exista la posibilidad de que individualmente, alguien en el país, con suma discreción sustente el perjuicio racial, siendo incierto del todo el discrimen que falsamente se supone contra los haitianos que habitan el país»: *Octavo informe periódico que los Estados Partes debían presentar en 1998: Dominican Republic*, UNCERD, (1999), CERD/C/331/Add.1, at 6, online: United Nations Human Rights Website <[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CERD.C.331.Add.1.Sp?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CERD.C.331.Add.1.Sp?Opendocument)> [*Octavo informe periódico*].

⁸⁰ These terms are commonly used by the State, through its reports, including those submitted to the UN Committee on the Elimination of Racial Discrimination, which has obviously been repeatedly denounced by the latter. See UNCERD, *Observaciones finales para Eliminación*, *supra* note 78 at 8, 12-14.

⁸¹ Human Rights Watch, *supra* note 75 at 9.

the 20th century⁸². These jobs were shunned by many Dominican workers and predominantly occupied by Haitian migrants. They were typically on plantations in marginal rural communities and slums, called "batey"⁸³ – areas often without drinking water or sanitation, and without health and social services⁸⁴. Haitian workers in these plantations continue to face extremely difficult working and underpaid conditions, often described as modern slavery⁸⁵.

In 1952, President Trujillo signed the first bilateral treaty of labour by which the Haitian government agreed to provide thousands of Haitian workers for seasonal work in the Dominican Republic sugar cane fields. This agreement remained in force until 1986⁸⁶. It should be noted that such treaties, as well as the interpretation of certain laws, as discussed below, have maintained the idea that all undocumented Haitians in the country entered as temporary workers.

However, since the 80s, demand in the sugar industry declined significantly, contrary to the phenomenon of Haitian migration. Therefore, other sectors, such as construction and domestic work, took advantage of this precarious and cheap labour force⁸⁷. This contradicts the misconception that Haitian citizens are in the Dominican Republic to perform only temporary work⁸⁸.

Many consider that the prosperity of the Dominican Republic is based, in part, on the exploitation of Haitian workers. Despite the fact that they, for the most part, have

no legal residence permits, they have, in most cases, their permanent and principal home in the Dominican Republic, not Haiti. For tens of thousands of children [of these workers] born in the Dominican Republic, Haiti is a country they know only through occasional visits or that they totally ignore. Their true country of residence is the Dominican Republic⁸⁹.

⁸² On this issue, see for example *Case of the Girls Yean and Bosico v Dominican Republic* (2005), Inter-Am Ct HR (Ser c), No 130 at para 109 and following, online: Inter-American Court of Human Rights <http://www.corteidh.or.cr/docs/casos/articulos/seriec_130_%20ing.pdf> [*Yean and Bosico*].

⁸³ OAS, Inter-American Commission on Human Rights, *Report on the Human Rights Situation in Dominican Republic*, OR OEA/Ser.L/V/II.104, Doc. 49 rev. 1(1999) at 335 and following [IACHR, *Report*].

⁸⁴ University of California, Berkeley, International Human Rights Law Clinic, *Invités indésirables : Une étude des expulsions d'Haitiens et de Dominicains d'origine haïtienne de la République Dominicaine vers Haïti* (Berkeley, California: International Human Rights Law Clinic, Boalt Hall School of Law, University of California Berkeley, 2002) at p 14, online: University of California at Berkeley <http://www.law.berkeley.edu/files/Invites_Indesirables.pdf> [*Berkeley Report*].

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ See Human Rights Watch, *supra* note 75 at 9.

⁸⁸ See Samuel Martínez, *Declaración pericial del Doctor Samuel Martínez en apoyo a la Comisión Interamericana de Derechos Humanos y los Peticionarios Originales en Yean and Bosico v República Dominicana* (2005) at para 45, online: Inter-American Court of Human Rights <<http://www.corteidh.or.cr/docs/casos/yeانبosico/martinez.pdf>> [Samuel Martínez].

⁸⁹ *Ibid* at para 46 [our translation] (« [a]unque la mayoría carecen de permisos de residencia legal, la mayor parte tienen su principal residencia permanente en la República Dominicana, no en Haïti. Para

However, a policy of mass deportations towards Haitians as well as Dominicans of Haitian descent began in the 90s⁹⁰. Criticized by several civil society organizations, mass expulsions have contributed to a climate of fear within the Haitian community, discouraging them from venturing out of the batey⁹¹. They also feed xenophobia in Dominican society, where Haitians often serve as scapegoats for many socio-economic problems⁹².

The great majority of mass expulsions follow a summary and extrajudicial process⁹³ and are mostly characterized by a disproportionate use of force by the Dominican authorities⁹⁴. These expulsions still persist to this day, and thousands of people are collectively deported outside of law each year⁹⁵. As we will see shortly, these expulsions and mass deportations are particularly facilitated by the restrictive interpretation made by the judicial authorities of the Dominican Constitution and the immigration legislation.

Inter-American Human Rights institutions have monitored this phenomenon of deportation and discrimination against Haitians in the Dominican Republic in different ways. On the one hand, the Commission has produced three reports denouncing the phenomenon⁹⁶. In 1999, the Commission conducted an on-site visit, during which it found massive violations committed by the Dominican authorities toward Haitians and Dominicans of Haitian descent⁹⁷.

las decenas de miles de sus hijos nacidos en la República Dominicana, Haití es un país que sólo conocen a través de visitas ocasionales o que desconocen totalmente. Su país de residencia efectivo es la República Dominicana».

⁹⁰ OAS, Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights 1991; Chapter 5: Situation of Haitians in the Dominican Republic*, OR OEA/Ser.L/V/II.81, Doc. 6 rev 1 (1992) [*Haitians in the Dominican Republic*]

⁹¹ Human Rights Watch, *supra* note 75 at 12.

⁹² Amnesty International, *Une vie en transit –La situation tragique des migrants haïtiens et des Dominicains d'origine haïtienne* (France: Les éditions francophones d'Amnesty Internationale, 2007) at 11 [*Une vie en transit*].

⁹³ OAS, Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in the Dominican Republic; Chapter IX: Situation of Haitian Migrant Workers and Their Families in the Dominican Republic*, OR OEA/Ser.L/V/II.104 Doc. 49 rev. 1(1999); *supra* note 90 at 325 and following.

⁹⁴ See also Amnesty International, *República Dominicana - Informe 2007*, online: Amnesty International <<http://www.amnesty.org/es/region/dominican-republic/report-2007>>.

⁹⁵ See for example *Une vie en transit*, *supra* note 92 at 15.

⁹⁶ *Haitians in the Dominican Republic*, *supra* note 90; IACHR, *Report*, *supra* note 83; OAS, Inter-American Commission on Human Rights, "Follow-Up Report on Compliance with the Recommendations of the IACHR on the Situation of Human Rights in the Dominican Republic" in *Annual Report of the Inter-American Commission on Human Rights 2001* OR OEA/Ser.L/V/II.114 doc. 5 rev (2002).

⁹⁷ IACHR, *Report*, *supra* note 83 at 363.

In addition, in the case of *The Girls Yean and Bosico v Dominican Republic*, the Inter-American Court stated that “the discriminatory treatment imposed by the State on the Yean and Bosico children is situated within the context of the vulnerable situation of the Haitian population and Dominicans of Haitian origin in the Dominican Republic, to which the alleged victims belong”⁹⁸. In the context of this case, the authorities of the Dominican Civil Registry refused to issue birth certificates to two girls of Haitian descent but born in the Dominican Republic. It should be recalled in this regard that the Dominican law grants citizenship based on the principle of *jus soli*. The two girls had been kept in a situation of statelessness and one of them had been denied access to public schools. The Court found various violations of victims' rights, including the right to protection and judicial guarantees, as well as the right to equality. In doing so, the Court took into consideration the many opinions expressed by the international community, including a *2005 Report of the United Nations Development Programme (UNDP)* stating that “Haitian immigrants and their descendants are being subjected to a triple exclusion: economic exclusion, exclusion because of their lifestyle and socio-political exclusion”⁹⁹. The Court then noted that “States must combat discriminatory practices at all levels, particularly in public bodies and, finally, must adopt the affirmative measures needed to ensure the effective right to equal protection for all individuals”¹⁰⁰.

Two months after the Court's ruling in the case of *Yean and Bosico*, the victims of Guayubin Massacre filed a complaint against the Dominican Republic before the IACHR.

III. The Case *Nadège Dorzema and others vs the Dominican Republic*

The facts of this case go back to June 18, 2000, when a group of Haitians was traveling aboard a truck on a road in the northern part of the Dominican Republic, along the Haitian border near the village of Guayubin. Arriving at a military checkpoint, the driver of the vehicle decided not to stop and, rather, accelerated. Several members of the Dominican army¹⁰¹ then pursued the truck and opened fire, using military weapons on the vehicle and its passengers, and injuring or killing several people, including a Dominican citizen sitting in the cabin next to the driver. After the car pursuit had crossed a village, the soldiers made a series of manoeuvres causing the truck to tumble, making additional victims. The military opened fire on

⁹⁸ *Yean and Bosico*, *supra* note 82 at para 168.

⁹⁹ *Informe nacional de desarrollo humano, República Dominicana 2005, Hacia una inserción mundial incluyente y renovada*, UNDP, (2005) at 141 and following, online: UNDP <http://hdr.undp.org/en/reports/national/latinamericathecaribbean/dominicanrep/dominican_republic_2005_sp.pdf>, [our translation] («[e]n efecto, los inmigrantes haitianos y sus descendientes se encuentran sometidos a una triple exclusión : exclusión socioeconómica, exclusión por el modo de vida y exclusión sociopolítica ») [UNDP, *Informe nacional*],

¹⁰⁰ *Yean and Bosico*, *supra* note 82.

¹⁰¹ They were, more specifically, members of the Border Intelligence Service (*Departamento de Inteligencia de Operaciones Fronteriza*) part of the Dominican armed forces.

some of the survivors who tried to flee, killing, among others, Nadège Dorzema, who was shot several times in the back. In total, seven people were killed and thirty others were injured in this terrible event.

After the massacre, some of the most seriously injured people were taken to a hospital, but did not receive adequate medical attention. The other survivors were taken to detention centers, where they were abused by agents of the Dominican State, arbitrarily detained and threatened with forced labor. The detainees were never formally identified, were never informed of the reasons for their detention, and were never brought before a judge or a competent official to determine the legality of their detention. With the exception of a few individuals who managed to escape, all the survivors were finally expelled from Dominican territory without any administrative or judicial decision formally made against them. Finally, the bodies of those killed during the massacre were not returned to the victims' relatives nor repatriated to Haiti; the local authorities instead buried the corpses immediately in a mass grave.

It is worth mentioning that the Dominican judicial authorities never conducted a serious investigation on these events and that the victims never had the opportunity to be heard by a competent, independent and impartial judge or tribunal. In fact, the military courts were granted jurisdiction on the matter and replaced the competent civil judicial authorities in charge of the investigation, in contravention of International Law standards¹⁰². Four soldiers involved in the massacre were eventually charged, but two of them were acquitted at trial, and a court of appeal cleared the remaining two. To date, no one has answered for this horrendous crime.

Faced with this situation of impunity, the Haitian organization *Groupe d'Appui aux Rapatriés et Réfugiés* (GARR), the Dominican organization *Centro Cultural Haitiano Dominicano* (CCHR) and UQAM's International Clinic for the Defense of Human Rights (CIDDHU in its French acronym) presented a petition before the Inter-American Commission of Human Rights in November 2005. The IACHR declared the case admissible in December 2008¹⁰³, indicating that the victims were unable to exhaust domestic remedies because the military judicial authorities did not constitute an independent and impartial tribunal which could allow access to an

¹⁰² On this issue, the Inter-American Commission and Court of Human Rights have consistently held that military courts cannot constitute an independent and impartial authority to investigate and prosecute violations of human rights committed by members of the armed forces. See especially *Nadège Dorzema v Dominican*, *supra* note 18 at 147 citing among others, *Radilla Pacheco v Mexico* (2009), Inter-Am Ct HR (Ser C) No 209 at para 279, online: Inter-American Court of Human Rights <http://www.corteidh.or.cr/docs/casos/articulos/seriec_209_ing.pdf>; *The Massacre Rochela v Colombia case* (2007), Inter-Am Ct HR, (Ser C) No 163, at para 200, online: Inter-American Court of Human Rights <http://www.corteidh.or.cr/docs/casos/articulos/seriec_163_ing.pdf>; *Escué Zapata v Colombia Case* (2007), Inter-Am Ct HR (Ser C) No 165, at para 105, online: Inter-American Court of Human Rights <http://www.corteidh.or.cr/docs/casos/articulos/seriec_165_ing.pdf>.

¹⁰³ See *Nadège Dorzema v Dominican* No 95/08, *supra* note 18. In the decision on admissibility, the Commission declared that it had jurisdiction to hear the petition and considered it admissible for the alleged violation of Articles 4, 5, 7, 8, 24 and 25 of the *American Convention on Human Rights* in relation to Article 1.1 of the latter. In addition, by applying the principle *iura novit curia*, the Commission concluded that the petition was admissible for non-compliance with Article 2 of the *American Convention on Human Rights*.

effective remedy. Time and time again during the international litigation process, the Dominican State did not present substantive argument or evidence in a timely manner and rather tried, unsuccessfully, to short-circuit the proceedings.

In November 2010, the Commission adopted its report on the merits of the case and declared that the State had violated several rights of victims, including their right to life (Article 4.1 of the *American Convention*), to personal integrity (Article 5.1 and 5.2), the individual freedom and security (Art. 7.1, 7.2, 7.3, 7.4, 7.5, 7.6), to due process and judicial guarantees (Article 8), to judicial protection (Article 25) and to non-discrimination (Article 1)¹⁰⁴. It also considered that the State had violated the prohibition to adopt or maintain laws contrary to the *American Convention* (art. 2), considering the fact that the Dominican domestic legislation expressly assigned to military courts jurisdiction to investigate and prosecute these types of cases.

In addition, the IACHR concluded that the Dominican State should pay compensations to the victims, ensure a new investigation and a new trial by the civilian judicial authorities in order to punish those responsible for the massacre, establish an appropriate mechanism to facilitate the identification of certain victims, and adopt several legislative amendments and other types of preventive measures to ensure that this type of situation never occur again.

The Dominican State did not comply with the recommendations of the Commission, which submitted the case to the Inter-American Court of Human Rights in February 2011. While the victims' representatives submitted arguments and evidence in July 2011, the State did not do so in the prescribed time limits. In addition, several non-governmental and academic organizations presented *amicus curiae* briefs, some of which have been reproduced in the present special edition volume¹⁰⁵. Finally, in June 2012, the parties participated in a public hearing at the headquarters of the Inter-American Court in San José, Costa Rica, in which two survivors of the massacre presented their testimonies. The Court adopted its judgment in October of 2012 and released it a month later¹⁰⁶, more than twelve years after the massacre and seven years after the beginning of the international judicial remedies.

It should be noted that, during the proceedings before the Inter-American Court, the representatives of the victims claimed that the case was not only about the

¹⁰⁴ *Nadège Dorzema v Dominican*, *supra* note 18.

¹⁰⁵ Among others, the organization Equal Rights Trust and *Consejo Latinoamericano de Estudiantes de Derecho Internacional y Comparado* as well as university clinics such as the Asylum & Human Rights Clinic of the Faculty of Law of Boston University, the *Instituto de Derechos Humanos Bartolomé de las Casas*, of the University Carlos III of Madrid and the International Human Rights Clinic of the Faculty of Law at Loyola University. See the *Amicus Curia* (novembre 2013) RQDI 139 aux pp 139-384.

¹⁰⁶ *Nadège Dorzema v Dominican*, *supra* note 18.

arbitrary detention and the massacre of the victims, but was also emblematic of the systematic practice of massive and collective expulsion of Haitian migrants in contravention of Inter-American Law (Article 22.9 of the *American Convention*)¹⁰⁷, and characterized by violations of the victims' right to equality and protection from discrimination (Articles 1 and 24 of the *American Convention*)¹⁰⁸ resulting *inter alia* from the existence of a discriminatory normative framework¹⁰⁹. They also alleged that the discrimination against victims was such that the State had denied them the right to legal personality (Article 3 of the *American Convention*). Indeed, whenever the victims came into contact with the State agents, they were either killed, forcibly removed from the Dominican territory, or their existence was denied or ignored in order to prevent them from exercising their human rights before other State agencies (as was the case by the hospital staff when some survivors tried to claim their right to health or as was the case by judicial officers when the victims attempted to exercise their right to justice). The entire factual sequence indicates quite boldly that the Dominican authorities considered that the victims had no rights and, for all practical purposes, did not exist. Indeed, while the victims were under the control of local authorities, no State agent took the trouble to even identify the victims (during their arrest, detention or expulsion, or during the time spent at the local hospital). In fact, while no judicial determination was ever made of the victims' migratory status, the Dominican authorities systematically and formally qualified them as "illegals", illustrating to what extent the State agents considered the victims' existence to be outside the law. In reality, the Dominican authorities considered that the victims had no legal personality and were rather "legally dead", as admitted time and time again by State agents before and during the proceedings¹¹⁰.

That said, the most controversial aspect of this case has undoubtedly been the discriminatory nature of the alleged violations. Proving this type of violation before an international tribunal has certainly been one of the victims' main challenges, as will be addressed in the following section.

¹⁰⁷ *Supra* note 2.

¹⁰⁸ *Ibid.*

¹⁰⁹ On this issue see *infra* note 124 and following.

¹¹⁰ See Dominican Republic, *Alegatos Finales del Estado 23 y 26 de Julio de 2012*, document submitted to the Inter-American Court of Human Rights: " [una] persona con la que no cuente debida documentación in a Estado de derecho equivale of hecho, has a civil-muerto "(at para 78.2 Paragraph 25). See also « [l]a persona que no cuente con la debida documentación en un Estado de derecho equivale, de hecho, a un muerto-civil ; y si estando indocumentado, padece de los efectos de la discriminación racial, más que un muerto-civil pasa a ser un ser inexistente, perpetuamente condenado al anonimato y la exclusión » (at para 78.3 sub-paragraph 3). For a broader discussion on this issue see Christopher Campbell-Durufflé, "The Right to Juridical Personality of Arbitrarily Detained and Unidentified Migrants after the Case of the Guyaubin Massacre" (novembre 2013) RQDI 425 [Campbell-Durufflé].

IV. Proving Discrimination: Proposed Approaches for a Change of Paradigm

Throughout this case, the representatives of the victims alleged that all the violations committed were characterized by discrimination, in part because, from the start, the Dominican authorities presumed the illegality of the victims' migratory status, based on the color of their skin and their alleged Haitian origin.

Accordingly, the representatives of the victims submitted several alternative arguments to the Court: first, that the actions of officials constituted direct discrimination; in addition or alternatively that the IACtHR could presume that these actions were discriminatory, considering the characteristics of the violations and their context; and, finally, that the Court could reverse the burden of proof and require that the State demonstrate that the actions of its agents were justified. It was also suggested that the IACtHR should recognize that the State had an obligation to specifically investigate the allegations of racism formulated throughout this case.

A. Direct Discrimination

The representatives of the victims first argued that the crimes committed during and after the massacre were acts motivated by or based on discriminatory grounds prohibited by the *American Convention* (eg. race, skin color, ethnicity, national or social status, etc.). They alleged that, during each of their contacts with the State agents, the victims were the subject of a distinct treatment due to the fact that the Dominican authorities presumed that they were Haitians in an irregular migratory situation. This treatment was different from that provided to the Dominicans and to the foreigners of other nationalities¹¹¹. The representatives alleged that this distinct treatment was evidenced every time the victims were in contact with the agents of the States, more specifically 1) by the use of lethal force during the vehicle pursuit; 2) by the denial of medical attention at the hospital; 3) by the arbitrary detention and expulsion of the survivors; 4) by the denial of justice (more specifically during the investigation and the military judicial proceedings); and 5) by the treatment reserved to the bodies of the deceased.

It was first alleged that, while they chased the victims' vehicle after it crossed the check point, the soldiers opened fire and made use of lethal force without it being motivated by an imminent danger to their lives or that of others. This violence was directed exclusively at the victims because the military authorities assumed that they constituted a group of Haitians. Indeed, the documentation produced during the

¹¹¹ On this issue, see The Equal Rights Trust, *Declaration of Principles on Equality*, (United Kingdom, London, The Equal Rights Trust, 2008) at principle 5, online: The Equal Rights Trust <<http://www.equalrightstrust.org/ertdocumentbank/Pages%20from%20Declaration%20perfect%20principle.pdf>> See also Equal Rights Trust, *Amicus Curiae sobre los estándares internacionales relevantes relacionados con la discriminación racial*, presented to the Court in *Case Dorzema*, July 2012, at para 24. The Equal Rights Trust, "Amicus Curiae" (novembre 2013) RQDI pp 217.

military criminal investigation systematically indicated that the soldiers considered the group in the vehicle to be "illegal Haitians," including the assistant driver who was shot dead at the beginning of the car pursuit, who fell off the truck and who was, in fact, of Dominican nationality. This violent treatment was distinctively and specifically reserved for "Haitians". Indeed, several soldiers admitted having been ordered over the radio to momentarily stop shooting at the victims while they crossed a nearby village, to avoid hurting Dominican nationals. It is also worth mentioning that the Dominican authorities never condemned these acts of violence. Instead, one day after the massacre, the chief of staff of the Dominican army publically declared that his soldiers had, on the contrary, done their duty defending the motherland.

It was then demonstrated secondly that the wounded survivors brought to the nearby hospital did not receive appropriate care and were in fact ignored by the medical personnel, while the other patients of Dominican origin were regularly treated. During the hearing before the Inter-American Court, one of the survivors even testified to the effect that "the Haitian people seriously injured were treated worse than dogs." This distinct treatment reserved to patients allegedly of Haitian origin was not only discriminatory, but was also in clear contravention of the principle of triage applicable in medical emergency facilities¹¹².

Thirdly, the victims' representatives showed that they were deported summarily and extra judicially, while foreigners of other nationalities were the object of judicial and administrative processes which enabled them to present their case and defend their rights¹¹³. In fact, according to the Dominican Office of the Access to Information, the Department of Haitian Affairs and the Department of Statistics, it is not necessary to ensure such administrative and judicial proceedings regarding Haitian nationals, since they "are not deported, they are merely returned to their country"¹¹⁴. As demonstrated by the *Consejo Latinoamericano de Estudios de Derecho Internacional y Comparado Capítulo República Dominicana* (hereinafter COLADIC-RD), a Dominican organization that participated in the proceedings as an *amicus curiae*, the Dominican authorities usually claim that they return or push back the Haitians that they deport ("*proceso de devolución*"), claiming that the latter never really crossed the border into the Dominican Republic¹¹⁵. This proposition is, of course, a lame legal fiction in this case, as in most cases of collective deportation of Haitians, since the great majority of the Haitians deported are captured well within the Dominican territory, including in the batey.

¹¹² According to this principle, the medical profession must ensure the treatment of patients according to the severity of their condition and not the color of their skin. On this issue, see E. R. Frykberg « Triage: Principles and Practice » (2005) 94 *Scandinavian Journal of Surgery* 272–278.

¹¹³ See Consejo Latinoamericano de Estudios de Derecho Internacional y Comparado Capítulo República Dominicana-COLADIC-RD, *Formal Presentación de Escrito de Amicus Curiae Caso 12.688. Nadege Dorzema y Otros (« Masacre de Guayubín ») respecto de República Dominicana*, presented to the Court in *Case Dorzema*, July 2012. COLADIC, "Amicus Curiae" (novembre 2013) RQDI 137. See also Dominican Republic, Supreme Court of Justice, *Je Kong Chong y compartes* (1997), Habeas Corpus, decision No 3; Dominican Republic, Supreme Court of Justice, *Iván Cech* (2008), challenging the act of deportation issued by the Executive on May 11 2006, decision No 4.

¹¹⁴ COLADIC, *supra* note 113 at Appendix 3-A.

¹¹⁵ *Ibid* at 48 and following.

The victims' representatives alleged fourthly that they were also discriminatorily denied access to justice regarding the investigation and trial of those responsible for the massacre. Indeed, it was demonstrated that all the documentation used during the criminal investigation referred to the victims as "illegal Haitians"¹¹⁶. On this matter, it should be recalled that no competent Dominican administrative or judicial authority ever ruled on the legality or illegality of the victims' migratory status. Accordingly, the military investigating authorities presumed that the victims' migratory status was irregular, based solely on the latter's skin color and on the fact that they appeared to be travelling from the Haitian border. In addition to this racist assumption, the representatives of the victims demonstrated that, in this specific case, the investigation was clearly substandard since the victims were not identified, since their testimonies were never taken, since the crime scene was not protected, since physical evidence was not gathered, etc.

Moreover, by referring the case to the military authorities rather than to the ordinary civilian system, the State prevented the victims from accessing justice. Indeed, it was established that, in similar cases of violence perpetrated by the armed forces against Dominican civilians, ordinary civilian judicial authorities were granted jurisdiction for the investigation and the trial of the accused. In fact, in the present case, the only person who was granted a civilian judicial process was the truck driver, of Dominican nationality, who was charged and brought before an ordinary civilian court and who remains, to date, the sole person related to this dreadful incident who has been able to defend his rights before an impartial and independent judicial authority.

Finally, the representatives of the victims alleged that, by immediately burying the bodies of deceased in a local mass grave, by not repatriating the corpses and by refusing families of the deceased to access the remains of their relatives, the Dominican authorities have also reserved a separate treatment for the Haitians, distinct from that granted to Dominicans. Indeed, the body of the only Dominican victim (the assistant driver mentioned above), was formally handed over to his family, which was able to bury their loved one in accordance with their wishes and beliefs.

The representatives of victims therefore invited the Court to conclude that all of this factual sequence was, in fact, a series of discriminatory and racist actions on the part of the State agents.

B. The Presumption of Fact

Alternatively, the Court was invited to conclude that the violations committed by the State were discriminatory in nature, because of the application of various presumptions of fact. Indeed,

¹¹⁶ For example, the death certificate of the assistant driver, a Dominican national named Ruben Espinal, states that he is a "Haitian resident of Cap-Haitien Haiti" (while M. Espinal did not have identity documentation on him during the events).

during international trials, since it is often very difficult to demonstrate that the actions of officials were motivated by discrimination and racism (which can be proved by documentary evidence or confessions for example¹¹⁷), international courts often resort to inferences of fact to determine the intention of the parties involved¹¹⁸. In this specific case, the victims' representatives thus contended that the Inter-American Court should assume that the violations committed were motivated by the same type of discrimination as that described by the several reports, resolutions and decisions produced by the international community regarding Dominican public policy.

More specifically, it was argued that the violations had to be understood as elements of a broader pattern of State-sponsored discrimination directed against Haitians or part of a structural context of discrimination in the Dominican Republic. Indeed, this context has been amply documented by international agencies of the OAS and of the United Nations (including the Inter-American Commission on Human Rights, the Council of Human Rights of the UN, the UN Human Rights Committee, the United Nations Development Programme, the UN Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, the UN Independent Expert on Minority Issues, the Committee for the Elimination of Racial Discrimination, etc.) and various non-governmental organizations (including Human Rights Watch, Amnesty International), leading universities (including the University of California at Berkeley), as well as by Dr. Samuel Martinez, the expert witness heard by the Court during the *Yean and Bosico* case a few years ago.

This expert, as well as all of these organizations concluded unanimously that there was and continues to exist, in the Dominican Republic, a context of structural discrimination against Haitians. In general, this situation is mainly characterized by 1) systematic acts of violence against Haitians directly perpetrated or condoned by the authorities¹¹⁹, 2) persistent impunity for such abuses¹²⁰, 3) systematic patterns of

¹¹⁷ See, eg, *Prosecutor v Goran Jelusic*, IT-95-10-T, Judgment (14 December 1999), (International Criminal Tribunal for the former Yugoslavia), online: United Nations, International Criminal Tribunal for the former Yugoslavia <<http://www.icty.org/x/cases/jelusic/tjug/en/jel-tj991214e.pdf>>.

¹¹⁸ See for example the case of the International Criminal Tribunal for Rwanda (ICTR) in regard to the crime of genocide. See especially *Prosecutor v Jean-Paul Akayes*, ICTR-96-4-T, Judgment (2 September 1998), (International Criminal Tribunal for Rwanda), online: ICTR <<http://www.unicttr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf>> See also jurisprudence of the European Court of Human Rights, in particular the decision *Natchova and al v Bulgaria [GC]*, No 43577/98 and 43579/98 [2005] VII ECHR 1 [ECHR, *Natchova*]. More generally, see also Felix Chitharanjan Amerasinghe, "Presumptions and inferences in evidence in international litigation" (2004) 3 *Law & Prac Int'l Ct & Tribunals* 395.

¹¹⁹ See, for example, Human Rights Watch, *supra* note 81 at 10. The phenomenon of violence is also well documented by the press in the Dominican Republic. Many media articles were submitted to the Court as evidence by the victims' representatives.

¹²⁰ Obviously, Haitians and people of Haitian origin usually do not appeal to the local judicial authorities to solve their problems or to report violence against them, for fear of detention and deportation. According to the expert Samuel Martinez, heard by the Inter-American Court in the *Case of the Yean and Bosico*, "[t]he Haitians know that they will not find answers to their complaints through the Dominican judicial system"; Samuel Martínez, *supra* note 88 at para 56 [our translation] (« [I]os

arbitrary and massive deportations against this specific group of people¹²¹, 4) denial of economic, social and cultural rights for these people, as well as a denial of access to public services, particularly in the sectors of health and education¹²², and finally, 5) by a context of incitement to racism, xenophobia and discrimination against Haitians, encouraged by sectors of the political class and several media¹²³.

The victims' representatives then demonstrated that the sequence of violations reported in the *Dorzema* case corresponded in all respects to these five basic characteristics of the context of structural discrimination. Indeed, the factual sequence described in the previous section is composed of an arbitrary use of deadly force against the victims (characteristic 1) for which no one was ever held criminally responsible (characteristic 2), and which was accompanied by the arbitrary and summary arrest, detention and collective expulsion of the survivors (characteristic 3). The wounded survivors were denied medical attention (characteristic 4). Finally, the victims' efforts to obtain justice before the Inter-American institutions were described by many sectors of the media and of the political class as a conspiracy to tarnish the State's international image, generating numerous xenophobic articles and editorials against Haitians or people of Haitian origin (characteristic 5).

Accordingly, the Court was asked to presume that the violations committed by the State agents in the present case were characterized by the same racist and discriminatory *modus operandi* described unanimously by the international community and by the expert reports on record.

haitianos saben en general que no encontrarán remedio a sus quejas mediante el sistema judicial dominicano »).

¹²¹ According to the expert Samuel Martínez, "the lack of identity documents exposes the Haitians and Dominicans of Haitian descent to violations of due process because the people considered as Haitians are usually subject to deportation to Haiti without any kind of judicial review when arrested": *Ibid* at para 53 [our translation] ("*[l]a falta de cédula también expone a los dominicohaitianos a la vulneración de sus garantías procesales, dado que las personas consideradas haitianas en el momento del arresto suelen ser deportadas a Haití sin ningún tipo de revisión o recurso judicial*"). See also IACHR, *Report*, *supra* note 83 at para 366; *Octavo informe periódico*, *supra* note 79 at para 13.16; *Informe del Relator Especial sobre las formas contemporáneas de racismo, discriminación racial, xenofobia y formas conexas de intolerancia, Doudou Diène, y de la experta independiente sobre cuestiones de las minorías, Gay McDougall*, UNHRC, 7th Sess, A/HRC/7/19/Add.5, A/HRC/7/23/Add. 3 (2008) at para 102 and 113 [*Informe del Relator Especial*]; UNDP, *Informe nacional*, *supra* note 99 at 128; *Yean and Bosico*, *supra* note 82 at para 109(10); Berkeley Report, *supra* note 84 at 5 and following.

¹²² See, eg, UNCERD, *Observaciones finales para Eliminación*, *supra* note 78 at para 12 and 18. According to the expert Martínez, "some health professionals of the State had refused to treat people in need because they do not have identity documents or were considered Haitians" Samuel Martínez, *supra* note 88 at para 58 [our translation] («*[s]e han informado de que personal sanitario del Estado se ha negado a atender personas que lo necesitaban porque no tenían cédulas o eran consideradas « haitianas »* »).

¹²³ Human Rights Watch noted that such inflammatory statements from government officials are common in the national political culture, Human Rights Watch, *supra* note 75 at 10.

In addition, and perhaps more importantly, the victims' representatives submitted that the violations were allowed to occur because of the existence, in the Dominican Republic, of a legal framework by nature discriminatory against Haitians and Dominicans of Haitian ancestry. Indeed, although the Dominican laws and regulations do not expressly make reference to people of Haitian descent to establish differential treatment towards them, the interpretation and application of these standards by administrative and judicial authorities have had and continue to have discriminatory effects against this group of the population.

Already in 1991, the Inter-American Commission on Human Rights had expressed concern about the "restrictive interpretation" made by the State of Article 11 of the Political Constitution of 1994, under which "is a Dominican 1) any person born in the territory of the Republic, except the legitimate children of foreigners living in the country as diplomatic agents or those in transit through the territory"¹²⁴. The IACHR was also preoccupied with the fact that Haitian workers who had not received regular identification documentation in the country – even if they had lived and worked all their lives – were being considered by the judicial and administrative authorities as "foreigners in transit" within the meaning of the Constitution. Dominican authorities therefore denied the granting of citizenship under the law of *jus soli* for children who were born in the Dominican territory of parents who were Haitian workers¹²⁵. Similarly, in 2001, the UN Human Rights Committee reaffirmed that this interpretation of the Constitution was discriminatory¹²⁶.

In addition, the adoption of the *General Immigration Law 285-04127* of 2004 has reinforced this tendency, expressly reaffirming this interpretation of the terms "in transit" contained in Article 11 of the Constitution¹²⁸. The constitutionality of several sections of this law was also reaffirmed in 2005 by the Supreme Court of Justice of the Dominican Republic, which, in its interpretation of the legislation and of the Constitution, then created a legal fiction according to which every person who is illegally present in the country is to be considered "in transit", regardless of time spent living in the territory. In doing so, the Court reaffirmed that the provisions which prohibit discrimination in the Constitution in fact refer to the right to equality *for Dominican men and women*¹²⁹.

¹²⁴ *Constitución Política de la República Dominicana de 1994*, art 11 [our translation] (Art 11 *Todas las personas que nacieren en el territorio de la República, con excepción de los hijos legítimos de los extranjeros residentes en el país en representación diplomática o los que están de tránsito en él*).

¹²⁵ IACHR, *Report*, *supra* note 83 at 363.

¹²⁶ UN Human Rights Committee, *Examen de los informes presentados por los Estados partes de conformidad con el artículo 40 del Pacto*, CCPR/CO/71/DOM, 71 Sess, at para 18.

¹²⁷ Dominican Republic, *Reglamento de aplicación de la Ley General de Migración No. 285-04, del 15 de agosto de 2004* (2011), No 631-11 [Dominican Republic, *Reglamento*].

¹²⁸ *Supra* note 124.

¹²⁹ Dominican Republic, Supreme Court of Justice, *Servicio Jesuita a Refugiados y Migrantes (SJRM 2005)*, Sentence No 9, (« [...] la prohibición constitucional que condena todo privilegio y situación que

In 2010, a new Constitution was adopted. Former Article 11 was replaced by the current Article 18¹³⁰, an identical provision, insofar as it provides that nationality should not be granted under the law of *jus soli* to persons "in transit" and to those who reside illegally in the country (as defined by Dominican law). Although that interpretation of "alien in transit" or of "person illegally residing in the country" should in theory apply to any person in this situation, regardless of national origin or skin color, it is clear that this legislation and its interpretation have had and continue to have a disproportionate impact on people of Haitian descent in the country. Indeed, as described previously, Haitians the largest group of foreigners in the Dominican Republic (about 10% of the total population). Moreover, instead of referring to the right to equality of all persons without distinction, as is usually the case for any national constitution or international treaty, the Political Constitution of 2010 refers expressly to the right to equality "of Dominicans"¹³¹, as did the Supreme Court in 2005 decision.

In addition to the discriminatory nature of the Constitution, a multitude of laws, regulations, guidelines, directives, policies and practices of State agents discriminate against people of Haitian origin.

On the one hand, *Law No. 285-04*¹³² authorizes immigration inspectors to refuse the admission into the Dominican Republic of a foreigner on several questionable grounds, such as having a serious "mental illness", having a "chronic physical limitation," having "no profession or occupation", etc. (Art.15). Also, the practice of deportation under the legal fiction of "*devolución*" (pushing back or returning people who allegedly never crossed the border), described above¹³³, is applied in a systematic manner against people of Haitian origin.

Likewise, *Directive No. 017 of 2007*¹³⁴ prohibits civil registry agents from issuing identity documents, including birth certificates, to anyone unable to prove the legality of the residence of his or her parents. More specifically, the directive allows for the suspension of birth certificates for people whose parents did legally not reside

tienda a menoscabar la igualdad de todos los dominicanos que son, en definitiva, quienes podrían invocar las diferencias [...] »).

¹³⁰ *Constitución Política de la República Dominicana* (2010), Official Gazette No 10561 (2010) ("Las personas nacidas en territorio nacional, con excepción de los hijos e hijas de extranjeros miembros de legaciones diplomáticas y consulares, de extranjeros que se hallen en tránsito o residan ilegalmente en territorio dominicano. Se considera persona en tránsito a toda extranjera o extranjero definido como tal en las leyes dominicanas »).

¹³¹ *Ibid* at art 39 (*Artículo 39- Derecho a la igualdad. Todas las personas nacen libres e iguales ante la ley, reciben la misma protección y trato de las instituciones, autoridades y demás personas y gozan de los mismos derechos, libertades y oportunidades, sin ninguna discriminación por razones de género, color, edad, discapacidad, nacionalidad, vínculos familiares, lengua, religión, opinión política o filosófica, condición social o personal. En consecuencia: 1) La República condena todo privilegio y situación que tienda a quebrantar la igualdad de las dominicanas y los dominicanos, entre quienes no deben existir otras diferencias que las que resulten de sus talentos o de sus virtudes ; [...]*) [Emphasis added].

¹³² Dominican Republic, *Reglamento*, *supra* note 127.

¹³³ See *supra* note 113 and accompanying text.

¹³⁴ *Ibid* at 19 and following.

in the country at the time of issuance of the said certificate. This, of course, has the retroactive effect of denying the right to *jus soli*-based nationality for most people of Haitian origin. The constitutionality of this directive was upheld by the Supreme Court in 2011¹³⁵. It goes without saying that the previously mentioned UN experts dealing with the issues of discrimination and minority rights unanimously condemned *Directive No. 017*, indicating that it had a discriminatory effect and recommending its immediate repeal¹³⁶.

In a similar manner, *Resolution 12-2007 of Central Electoral Authority*¹³⁷ allows for competent State agents to temporarily suspend the issuance of civil registry identity documents if the applicant's record contains "irregularities" or "flaws". While this resolution may appear neutral at first glance, it is used, in practice, to invalidate the identity documents of a multitude of children born of Haitian parents and to cancel the registration of birth certificates of many people who have lived all of their life as Dominican citizens.

Moreover it should be noted, that the aforementioned *General Immigration Law No. 285-04*¹³⁸ requires hospitals to document all cases of children born of a "foreign woman who does not present a document attesting to the legality of her residence in the country"¹³⁹. To do so, medical personnel must use specific stationery, different in color than that used for documenting births of children with "normal parents". The births of children with foreign mothers should also be recorded in a special register ("libro de extranjeria") to be delivered to the Central Electoral Authority and to the Ministry of Foreign Affairs¹⁴⁰.

The United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, as well as the UN Independent Expert on Minority Issues, both concluded that all of the aforementioned administrative measures currently used to deny citizenship to people of Haitian descent in the Dominican Republic are acts of discrimination¹⁴¹.

Similarly, on the more specific issue of access to public education, the National Board of Education adopted, in May 2009, the Organic Rules on public educational institutions, which prohibits school authorities from enrolling children at the primary and secondary levels if the children or their parents cannot prove their age by producing a valid birth certificate. Of course, the real purpose of this measure is, more likely, to prevent the enrollment of children of Haitian parents. In fact, this measure has resulted in a significant reduction in the enrollment of these children in

¹³⁵ Dominican Republic, Supreme Court of Justice, *Emildo Bueno Oguis* (2011), decision No 460.

¹³⁶ See for example *Informe del Relator Especial*, *supra* note 121 at para 129.

¹³⁷ Dominican Republic, Central Electoral Board, *Resolución que establece el procedimiento para la suspensión provisional de la expedición de actas del estado civil viciadas o instrumentadas de manera irregular* (2007), No 12-2007.

¹³⁸ Dominican Republic, *Reglamento*, *supra* note 127.

¹³⁹ *Ibid.*

¹⁴⁰ See *Informe del Relator Especial*, *supra* note 121 at para 67.

¹⁴¹ *Ibid* at para 110.

the public school system¹⁴².

Finally, in addition to referring to these various laws, regulations and government practices of a discriminatory nature or effect, the victims' representatives also brought to the attention of the Inter-American Court the existence, in the Dominican Republic, of a multitude of agencies specializing exclusively in "Haitian issues". Indeed, there is a "Haitian affairs office" at the Ministry of Foreign Affairs (*División de Asuntos haitianos*), in the Army (*Departamento de Asuntos haitianos the Secretaría de Estado de las Fuerzas Armadas*), within the Police (*Departamento de asuntos haitianos*) and within the Immigration Department (*Departamento de Asuntos haitianos the Dirección de Migración*). The existence of such government agencies, specialized with racial issues, sadly recalls similar shocking examples in 1930s Germany and in apartheid South Africa.

Consequently, the representatives of the victims invited the Court to take into consideration the regulatory and administrative framework, which allowed for the racist Guayubin massacre to occur and to stay unpunished. They invited the IACtHR to conclude that a context of structural discrimination existed in the Dominican Republic and to presume that the violations of the victims' human rights were motivated by racism and discrimination.

C. Reversing the Burden of Proof

In addition to these claims, the victims' representatives submitted that the Court should adopt a new legal test for this type of situation. They invited the tribunal to consider that the evidence and arguments submitted in relation to direct or to presumed discrimination enabled it to conclude that the violations committed by the public authorities were discriminatory at least on a *prima facie* basis. Accordingly, it was suggested that the IACtHR should reverse the burden of proof, requiring that the State demonstrate that these facts and actions were not discriminatory, and that it provide an objective and reasonable explanation for the distinct treatment reserved to the victims in this case. In doing so, the Inter-American Court would adopt an approach similar to that adopted by the European Court of Human Rights in its 2007 decision *DH and Others v Czech Republic*¹⁴³.

In that case, the plaintiffs had alleged that the State had registered a disproportionate number of Roma children in special schools for children with intellectual disabilities. The ECHR noted:

[W]here an applicant alleging indirect discrimination thus establishes a rebuttable presumption that the effect of a measure or practice is discriminatory, the burden then shifts to the respondent State, which must show that the difference in treatment is not

¹⁴² See UNCERD, *Observaciones finales para Eliminación*, *supra* note 78 at para 15.

¹⁴³ *DH and Others v Czech Republic [GC]*, No 57325/00, [2007] IV, ECHR 241, online: European Court of Human Rights <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-83256>.

discriminatory. Regard being had in particular to the specificity of the facts and the nature of the allegations made in this type of case it would be extremely difficult in practice for applicants to prove indirect discrimination without such a shift in the burden of proof¹⁴⁴.

The European Court indicated that it would be illogical to require applicants to prove that the authorities involved were prompted by a discriminatory intent. Consequently, in such circumstances, applicants would only be required to prove the discriminatory effects of government policy, for example by "valid and meaningful" statistical information dealing with the group affected by the measure¹⁴⁵.

Under this approach, once the presumption of indirect discrimination is established, it is incumbent on the State to provide an "objective and reasonable justification" for its policy and prove that it is not related to "ethnicity"¹⁴⁶. This method helps to identify and eliminate measures, which are in appearance neutral, but which, in fact, constitute indirect discrimination. For example, in that case, the ECHR concluded that despite their apparent "neutrality", the educational policies of the Czech Republic had a *de facto* impact of discrimination on the children of Roma origin, which represented up to 70% of the population of those special schools¹⁴⁷. In addition, the European tribunal observed that the State had not provided for a reasonable and objective justification for such policies, which had "a disproportionately prejudicial effect on the Roma community"¹⁴⁸ and constituted a violation of the right to non-discrimination.

D. The Obligation to Specifically Investigate Occurrences of Racism

Finally, the representatives of the victims also argued that the State had violated its obligation not to discriminate in this case, because the local authorities did not pursue specific investigations dealing with the allegations of racism that accompanied the crimes reported. Indeed, it was affirmed that the right to equality and to non-discrimination contains a correlative implicit obligation of the State to specifically investigate allegations of racism. It was argued that, accordingly, once a State is – or should be – aware of such allegations, International Law not only requires it to diligently investigate, prosecute and punish those responsible, but also obliges State authorities to assess whether such violations were motivated by racism, xenophobia or discrimination.

¹⁴⁴ *Ibid* at para 189.

¹⁴⁵ *Ibid* at para 187.

¹⁴⁶ *Ibid* at para 195-196.

¹⁴⁷ *Ibid* at para 193.

¹⁴⁸ *Ibid* at para 208-210. ECHR found a violation of Article 14 of the European Convention (non-discrimination) in conjunction with Article 2 of Protocol No 1 (right to education).

Again, a similar approach was adopted by the Grand Chamber of the European Court of Human Rights in the decision *Natchova and al v Bulgaria*¹⁴⁹. In that case, the agents of the Bulgarian armed forces used disproportionate deadly force against defectors belonging to the Roma minority. In a manner similar to the case of the Guayubin massacre, it had been established that government officials had adopted an offensive and racist attitude against the victims. Similarly, the context of discrimination against Roma persons in Bulgaria had been widely recognized and documented by the international community.

In its decision, the ECHR emphasized that States not only have an obligation to investigate, prosecute and sanction such crimes with due diligence, but also have a positive obligation to assess whether the violations were committed on discriminatory grounds¹⁵⁰. In addition, the European Court stated that

[w]here there is suspicion that racial attitudes induced a violent act it is particularly important that the official investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of racism and ethnic hatred and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence¹⁵¹.

The ECHR emphasized that when acts of violence leading to the death of persons detained by the State, "authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events"¹⁵². "Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights"¹⁵³. Specifically, this obligation requires the compilation of all relevant evidence on the matter, taking concrete steps to seek the truth as well as to issue reasoned, impartial and objective decisions.

It should be emphasized that, according to the ECHR, the failure to conduct such a specific investigation may result not only in violation of the right to due process, but also of the right to non-discrimination. According to the European Court, the duty to promptly investigate such aspects of the crimes with impartiality and due diligence is implicitly contained in the prohibition of discrimination prescribed in the European Convention¹⁵⁴.

In the *Dorzema* case, evidence clearly showed that the military judicial authorities not only failed to pursue an adequate investigation and to prosecute and sanction the State agents responsible for the Guayubin massacre, but also that they

¹⁴⁹ ECHR, *Natchova*, *supra* note 118. Confirmed by *Bekos y Koutropoulos v Greece*, No 15250/02 [2005] XIII ECHR 1, 43 EHRR 2; and ECHR, *Members of the Congregation of Jehovah's Witnesses of Gldani and others v Georgia*, No 71156/01 [2007] ECHR 1160.

¹⁵⁰ *Ibid.*

¹⁵¹ ECHR, *Natchova*, *supra* note 118 at para 160.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid* at para 161.

completely failed to assess whether the soldiers – and the officers responsible for them – acted as a result of discrimination or racism. On the contrary, the victims' representatives presented to the Inter-American Court numerous documents issued by these same military judicial authorities attesting to their own racist and discriminatory bias in qualifying the victims as “illegals”. This qualification was based on the mere color of the victims' skin, whereas no judicial or administrative determination had been made regarding the regularity of their migratory status.

Based on these submissions, the representatives of the victims encouraged the IACtHR to formally recognize the existence of this additional obligation and to conclude that the State had committed another distinct violation of the obligation not to discriminate.

V. Conclusion

In November 2012, the Court published its decision, which it had adopted in the *Dorzema* case the month before. Of course this decision was a great victory for the victims and their representatives, since the tribunal granted most of the requested remedies.

As this special edition of the Quebec Journal of International Law has shown, this decision constitutes a major precedent for International Human Rights Law on different ground-breaking issues and has already been the object of numerous doctrinal discussions¹⁵⁵.

First, the decision further developed standards regarding the State's capacity to use force during migratory and border control operations, emphasizing that State agents may not use lethal force except in very strict circumstances (in self defense or to protect the lives of other for example). In addition, the Court also applied a very limited and rigorous standard with regards to admissible limitations to the right to liberty in the context of migration-control related operations. Similarly, it provided for a detailed set of rules regarding the right to due process and to judicial protection of migrants in circumstances of expulsion and deportation. It also strongly reiterated the prohibition of collective expulsions and deportations, provided for under the

¹⁵⁵ Paola Pelletier Quinones, "Análisis de la Sentencia *Nadège Dorzema y otros v República Dominicana*, Corte Interamericana de Derechos Humanos" (novembre 2013) RQDI 385 and Karla I. Quintana Osuna, "Los aportes de la Sentencia de la Masacre de Guyaubin al Sistema Interamericano de Derechos Humanos" (novembre 2013) RQDI 383. See also, Karlos A. Castilla Juárez, "Migración irregular y políticas migratorias bajo el análisis de la Corte Interamericana de Derechos Humanos: el caso *Nadège Dorzema y otros*" (2013) 95 *Revista Vasca de Administración Pública*. Herri-Ardulararitzako Euskal Aldizkaria 125. See similarly Paola Pelletier Quinones, "Ponencia: Criterio de la Corte Interamericana de Derechos Humanos Respecto a las Migraciones y su Impacto en la República Dominicana" (2011) 46 *Rev Jur UIPR* 805. See also Dorothy Estrada-Tanck, "Human Security and the Human Rights of Undocumented Migrants: Systemic Vulnerabilities and Obligations of Protection" (2013) 15.2 *Eur J Soc Sec* 151. See similarly Brett J. Kyle & Andrew G. Reiter, "Military Justice in New Democracies: Explaining the Process of Military Court Reform in Latin America" (2013) 47.2 *Law & Soc'y Rev* 375.

American Convention and by International Human Rights Law in general.

While it did not recognize a violation of the right to personality¹⁵⁶, it did rule that the State had violated the victims' right to equality and to non-discrimination. In doing so, the Court adopted important portions of the victims' representatives' submissions, strengthening International Human Rights Law standards on the issue.

Indeed, the Court did conclude that the State agents had committed acts of direct discrimination as suggested in section 4.1 above, taking into consideration the situation of special vulnerability of the victims and

(i) the absence of preventive measures to adequately address situations relating to migratory control on the land border with Haiti and based on their situation of vulnerability; (ii) the violence deployed by the illegal and disproportionate use of force against unarmed migrants; (iii) the failure to investigate the said violence, the absence of testimony by and the participation of the victims in the criminal proceedings, and the impunity of the events; (iv) the detentions and collective expulsion without the due guarantees; (v) the lack of adequate medical attention and treatment to the injured victims, and (vi) the demeaning treatment of the corpses and the failure to return them to the next of kin¹⁵⁷.

By doing so the Court reiterated the five types of direct discrimination instances suggested by the representatives (and described in section 4.1 above), attesting that at their every contact with the State agents, the victims suffered a distinct, discriminatory treatment.

Since the IACtHR accepted the applicants' main argument dealing with direct discrimination, it did not address their alternative arguments dealing with structural discrimination described in section 4.2 above. Indeed, the Court expressly indicated that, for the purpose of deciding this case, it was not necessary to decide whether a context of structural discrimination might exist against Haitian migrants in the Dominican Republic¹⁵⁸.

Nevertheless, it did acknowledge that "the United Nations Special Rapporteur on discrimination and its Independent Expert on minorities, as well as various international organizations, have referred to historical practices of discrimination in the Dominican Republic, which are demonstrated by the treatment of Haitian migrants and in the exercise their rights"¹⁵⁹, as suggested by the representatives of the victims.

The Court also itself acknowledged the existence of a broader context of discrimination against Haitians in the Dominican Republic. For example, regarding the use of lethal force by the soldiers, the tribunal indicated:

¹⁵⁶ Campbell-Durufilé, *supra* note 110.

¹⁵⁷ *Nadège Dorzema v Dominican*, *supra* note 18, at par 237.

¹⁵⁸ *Ibid* at par 40 and 228

¹⁵⁹ *Ibid* at par 232.

Consequently, the serious situation that occurred was the result, at least by negligence, of the disproportionate use of force that can be attributed to the State owing to the acts of law enforcement officials. In addition, *the Court observes that, in the context of discrimination against migrants*, the use of excessive force in the case revealed the failure to implement reasonable and appropriate measures to deal with this situation to the detriment of this group of Haitians¹⁶⁰. [...]

In particular, based on the context of the case, newspaper articles, different testimonies, and the complaint filed by the next of kin in the domestic jurisdiction, the State should have investigated the events, *taking into account the context of violence and discrimination against this type of victim*. To the contrary, the State did not give the Court any reasons that would have justified the said actions¹⁶¹.

More importantly, while dealing with the appropriate reparations required to remedy the violations which occurred in this case, the IACtHR indicated:

Since it has been proved that *the State was responsible for a pattern of discrimination against migrants in Dominican Republic*, the Court finds it relevant that the State organize a media campaign on the rights of regular and irregular migrants on Dominican territory in the terms of this Judgment¹⁶².

In addition, the Inter-American Court also recognized, as suggested by the representatives of the victims, that violations of the right to equality may occur even when general State practices appear neutral in nature or in application. Indeed, it ruled that

a violation of the right to equality and non-discrimination also occurs in situations and cases of indirect discrimination reflected in the disproportionate impact of norms, actions, policies or other measures that, even when their formulation is or appears to be neutral, or their scope is general and undifferentiated, have negative effects on certain vulnerable groups¹⁶³.

In a similar *obiter dictum*, the Court reiterated the representatives' position on the necessity of reversing the burden of proof when addressing certain occurrences of racial discrimination, as suggested by the representatives of the victims and described in section 4.3 above. Indeed, while it did not base its decision on such an approach (since it already ruled on the existence of direct discrimination), the IACtHR did acknowledge "the difficulty for those who are the object of discrimination to prove racial prejudice" [...and agreed] "with the European Court that, in certain cases of human rights violations motivated by discrimination, the burden of proof falls on the State, which controls the means to clarify incidents that

¹⁶⁰ *Ibid* at par 91, emphasis added.

¹⁶¹ *Ibid* at par 103, emphasis added.

¹⁶² *Ibid* at par 272, emphasis added.

¹⁶³ *Ibid* at par 235.

took place on its territory”¹⁶⁴.

Interestingly, in both of these *obiter dictum*, the Court referred to the European Court of Human Rights line of jurisprudence referred to by the representatives of the victims and discussed in section 4.3 above.

One can thus generally conclude that the victim’s litigation strategy regarding the demonstration of discrimination and violations of the right to equality was, generally speaking, a success. The Court’s decision on this issue clearly strengthens the relevant human rights standards on the issue and opens the door to interesting future developments.

The real challenge now remains the implementation of the judgment by the Dominican State. Notwithstanding the fact that the Dominican Republic has an international obligation to implement the decisions of the Court (Convention, art 63), and that the IACtHR will oversee the compliance of its own decision¹⁶⁵, it is unlikely that the State will fully respect and immediately implement all aspects of the decision. In fact, the Dominican State has still not fully complied with previous decisions issued by the Court similar issues. Instead, it seems that the decision *Yean and Bosico* has generated harsher reactions on the part of State agents against Haitian migrants and people of Haitian origin. In addition, one could argue that the controversial *Yean and Bosico* decision has partly resulted in the subsequent adoption of the discriminatory laws and regulations mentioned above (section 4.2).

In the Dominican Republic, the international litigation surrounding the Guayubin massacre has generated very critical reactions from politicians and some media against Haitians or people of Haitian origin, as well as against human rights defenders and the Inter-American System in general. For example, several prominent politicians, including the Minister of Immigration, recently called for the State to denounce the *American Convention* and waive the jurisdiction of the Inter-American Court¹⁶⁶.

In addition, this decision takes place in a particularly heated political context in the OAS. In recent years, the credibility of the Inter-American Human Rights System has faced many attacks from various States, including from Venezuela, which denounced the *American Convention*¹⁶⁷, as well as from Bolivia and Ecuador, which

¹⁶⁴ *Ibid* at par 229.

¹⁶⁵ See *Baena Ricardo and al v Panama case* (2003), Inter-Am Ct HR (Ser C) No 104, online: Inter-American Court of Human Rights <http://www.corteidh.or.cr/docs/casos/articulos/seriec_72_ing.pdf>.

¹⁶⁶ See for example Loyda Peña, "Afirma CIDH se extralimita ; sugirió denunciar Tratado" (2012) Hoy, online: Digital Hoy <<http://www.hoy.com.do/el-pais/2012/6/19/433336/Afirma-CIDH-se-extralimita-sugirio-denunciar-Tratado>>.

¹⁶⁷ See OAS, Inter-American Commission on Human Rights, *IACHR Regrets Decision of Venezuela to Denounce the American Convention on Human Rights*, OR Press Release No 117/12 (2012), online:

have made many public statements against the System, including at the General Assembly in 2012 in Bolivia¹⁶⁸.

Finally, one should note that the *Dorzema* decision will be crucial on the Dominican Republic since it sets a significant precedent for another important case of arbitrary mass deportations, *Benito Mendez and al v Dominican Republic*, which is currently litigated before the Inter-American Court¹⁶⁹.

This judgment is a good example of a State which, through its legislation and the practice of its agents, marginalized and excluded a certain group of human beings. This type of situation is not unique to the Dominican Republic, or to Latin America. Similar challenges arise in Europe (regarding the integration of Turkish guest workers in Germany, for example¹⁷⁰) or here in Canada¹⁷¹. Although the global phenomenon of migration generates important impacts on the "receiving States", it cannot, however, justify violations of the right to equality and non-discrimination of migrants. Every person, no matter his or her migratory status, is a bearer of rights. Indeed, as has been repeatedly reminded by intellectuals such as Elie Wiesel and Gabriel Chausovsky, no human being is, in itself, illegal.

Inter-American Commission on Human Rights <http://www.oas.org/en/iachr/media_center/PReleases/2012/117.asp>.

¹⁶⁸ See, eg, Jim Wiss, "OAS Rights Body Slammed at Annual Meeting," Miami Herald (5 June 2012), online: The Miami Herald <<http://www.miamiherald.com/2012/06/05/2834901/oas-rights-body-slammed-at-annual.html#storylink=cpy>>.

¹⁶⁹ *Benito Tide Méndez y otros v Dominican Republic* (2005), Inter-Am Comm HR, No 68/05, online: Inter-American Commission on Human Rights <<http://www.cidh.oas.org/annualrep/2005sp/RepDominicana12271sp.htm>>. See also OAS, Inter-American Commission on Human Rights, *IACHR Takes Case Involving Dominican Republic to the IA Court HR*, OR Press Release 91/12 (2012), online: <IACHR Takes Case Involving Dominican Republic to the IA Court HR>.

¹⁷⁰ See eg, Patricia Ehrkamp and H. Leitner, "Beyond National Citizenship: Turkish Immigrants and the (re) Construction of Citizenship in Germany" (2003) 24 *Urban Geography* 127.

¹⁷¹ See in this regard, Hugo Cyr, "Les droits et libertés des étrangers en situation irrégulière: Canada" (1998) 14 *Ann int j c* 137. See also Victor Piché, Eugénie Depatie-Pelletier & Dina Epale, "Obstacles to Ratification of the ICRMW in Canada", in Paul Guchteneire, Antoine Pécoud & Ryszard Cholewinski eds, *Migration and Human Rights: The United Nations Convention on Migrant Workers' Rights*, (Cambridge: Cambridge University Press (2010) at 193.