

**AMICUS CURIAE BRIEF PRESENTED TO
THE INTER-AMERICAN COURT ON HUMAN RIGHTS**

BY

**THE ASYLUM AND HUMAN RIGHTS CLINIC OF BOSTON UNIVERSITY SCHOOL
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IN THE CASE OF

Nadege Dorzema et al. vs. Dominican Republic

Filed: July 6, 2012

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I. INTRODUCTION

This brief is submitted to focus on particular violations of human rights under the American Convention on Human Rights (American Convention) and other binding norms that occurred in the events described in the factual record in the *Nadege Dorzema et al. v. Dominican Republic* (the “*Guayubin Massacre*”) case pending before the Inter-American Court of Human Rights (Inter-American Court). The focus of this brief is to bring to this Honorable Court’s attention the grave threat to the commitment to human rights in the Americas posed by the militarization of the Dominican Republic’s border in response to irregular entrants and migrants from Haiti. As this Court has recognized, fundamental *jus cogens* principles of equality and non-discrimination must apply to all aliens found in a State’s territory under all circumstances. The Court’s jurisprudence in this respect is critical to a just outcome in this case.

The Dominican Republic’s reliance on military border forces from the beginning to the end of the tragic events that took the lives of seven unarmed civilians and wounded thirty others deprived the victims of the most fundamental of international human rights. As a result of the non-recognition of their equality under the law and their right to non-discriminatory treatment, they were deprived of other core individual rights: the right to life; the right to humane treatment; the right to equal protection under Dominican law; the right to due process of law, particularly before summary expulsion; and the right to juridical personality—the recognition of the ‘right to have rights.’ In this case, the violations of the *jus cogens* norms of equality and non-discrimination led to further deprivation of the victims’ rights to prove protected status as refugees or irregular migrants.

The Dominican Republic’s acts in this case were a function of the excessive militarization of border patrol and inspections, a dangerous and expanding trend in the American region. The intention of this brief is to highlight the effects of militarizing border inspections and border crossings on States’ fundamental human rights obligations, to show the deteriorating effects of this phenomenon on basic human rights, particularly, as in this case, American Convention Articles 1.1, 3, 4, 5, 7, 8, and 24. In addition, the right to access internationally-recognized protection as refugees and migrants under the 1951 Refugee Convention and the Charter of the Organization of American States (OAS) were undermined by the actions taken by the Dominican Republic that treated the victims as security threats rather than irregular border-crossers—using heavy firearms to shoot, kill and maim unarmed civilians. The Dominican Republic’s acts are a disturbing, but not isolated, illustration of the growing threat posed by the phenomenon of border militarization.

II. INTERESTS OF AMICI CURIAE

Article 2.3 of this Court’s Rules of Procedure defines the term *amicus curiae* as a

person or institution who is unrelated to the case and to the proceeding and submits to the Court reasoned arguments on the facts contained in the presentation

of the case or legal considerations on the subject-matter of the proceeding by means of a document or an argument presented at a hearing.¹

This brief is submitted pursuant to Article 44.1 of this Court's Rules of Procedure, which provide that "[a]ny person or institution seeking to act as *amicus curiae* may submit a brief to the Tribunal."²

This *amicus curiae* brief has been prepared by the Asylum and Human Rights Clinical program (AHR) at Boston University School of Law. The AHR exposes second and third year law students to the practice of law in the context of immigration, refugee/asylum, humanitarian, human rights litigation and advocacy at local, national and international levels. Under the supervision of experienced clinical faculty, AHR students represent live clients and client groups, and engage in international human rights advocacy over the course of a full academic year. Professor Susan Akram is the supervising attorney of the program, and has worked with three law students/law graduates in the preparation of this brief (Timnah Baker, Shannon Jonsson and Catalina Blanco-Buitrago).

Co-signers on the brief are Professor Guy S. Goodwin-Gill and Professor Caroline Bettinger-Lopez. Professor Guy S. Goodwin-Gill is Professor of International Refugee Law at All Souls' College, Oxford University. He was formerly Professor of Asylum Law at the University of Amsterdam, and served as a Legal Adviser in the Office of United Nations High Commissioner for Refugees (UNHCR) from 1976-1988. He practices as a Barrister from Blackstone Chambers, London, and he has written extensively on refugees, migration, international organizations, elections, democratization, and child soldiers. His recent publications include *The Refugee in International Law*, (Oxford University Press, 2007, Third Edition with Dr. Jane McAdam); *Free and Fair Elections* (Inter-Parliamentary Union, Second Edition, 2006); *Basic Documents on Human Rights* (Oxford University Press, 2006, Fifth Edition with Ian Brownlie, Editors).

Professor Caroline Bettinger-López teaches international human rights law and directs the Human Rights Clinic (HRC) at the University of Miami School of Law. Her main regional focus is the United States and Latin America, specializing in race discrimination and immigrants' rights. She regularly litigates and advocates on these issues in the Inter-American Human Rights system as well as in the United Nations. She has worked on issues related to discrimination against individuals of Haitian descent in the Dominican Republic for over a decade, and was previously counsel in the case of *Benito Tide Mendez v. Dominican Republic*, a case concerning mass expulsions of Haitians that is currently pending before the Inter-American Commission on Human Rights.

In addition, Annex I to this brief contains the names of scholars and practitioners of human rights law and immigration/refugee law who join as *amici curiae*. These individuals, clinics and organizations join this brief based on their interest and expertise in the areas of international human rights; international refugee law and policy; international migration law and policy; and migration issues in the Americas. All listed *amici* are involved with issues addressed in this brief

¹ Rules of Procedure of the Inter-American Court of Human Rights, Art. 2.3, as amended by the Court during its LXXXV Regular Period of Sessions, held from November 16 to 28, 2009.

² *Id.* at art. 44.1.

and are particularly concerned about the broader consequences of this Court's decision in the underlying litigation. This brief should therefore be considered a joint submission of the authors and co-authors and the signatories for the purposes of the application of this Court's Rules of Procedure.

III. ARGUMENT

A. Equality and Non-Discrimination are *jus cogens* norms, and apply to all individuals found on a State's territory, whether citizens or aliens.

1. *The fundamental nature of the norms of equality and non-discrimination under the American Convention.*

Article 1 of the American Convention contains a general prohibition of discrimination regarding the exercise of the rights and freedoms laid down in the American Convention.³ It provides that

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.

The scope of the juridical concept of positive obligations within the Inter-American system is elaborated upon in Article 2 of the American Convention, which reads as follows:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

Additionally, Article 24 reads: "All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law."

The right to equal protection of the law as guaranteed by article 24 of the American Convention was considered by the Inter-American Court in its *Advisory Opinion on the Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*.⁴ The Court pointed out that although article 24 of the American Convention is not conceptually identical to article 1(1): "Article 24 restates to a certain degree the principle established in Article 1(1). In recognizing equality before the law, it prohibits all discriminatory treatment originating in a legal

³ Organization of American States, American Convention on Human Rights, art. 1, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 [hereinafter American Convention]. Where specific Convention articles are cited clearly in the text, no additional footnote citation will be given. The Dominican Republic ratified The American Convention on January 21, 1978.

⁴ Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion, Inter-Am. Ct. H.R. (Ser. A) No. 4 (January 19, 1984).

prescription.”⁵ The Court then gave the following explanation of the origin and meaning of the notion of equality:

The notion of equality springs directly from the oneness of the human family and is linked to the essential dignity of the individual. That principle cannot be reconciled with the notion that a given group has the right to privileged treatment because of its perceived superiority. It is equally irreconcilable with the notion to characterize a group as inferior and treat it with hostility or otherwise subject it to discrimination in the enjoyment of rights which are accorded to others not so classified. It is impermissible to subject human beings to differences in treatment that are inconsistent with their unique and congenerous character.⁶

2. *The fundamental nature of the principles of equality and non-discrimination under other treaties and law binding on the Dominican Republic.*

This Court’s jurisprudence is clear that under all circumstances, OAS Member States have an obligation of non-discrimination. Articles 3(1) and 17 of the OAS Charter proclaim that human rights should be enjoyed without any distinction.⁷ Article 3(1) provides: “The American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex.” Article 17 further states that: “Each State has the right to develop its cultural, political, and economic life freely and naturally. In this free development, the State shall respect the rights of the individual and the principles of universal morality.”

The principle of the equal and effective protection of the law and of non- discrimination is embodied also in Article II of the American Declaration on the Rights and Duties of Man (American Declaration) which proclaims that “All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.”⁸ In its report in *Coard v. United States*,⁹ the Inter-American Commission of Human Rights stated that Article II proclaims “the fundamental rights of the human being” and further commented that “[g]iven that individual rights inhere simply by virtue of a person’s humanity, each American State is obliged to uphold the protected rights of any person subject to its jurisdiction.”

⁵ *Id.*, ¶ 54.

⁶ Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, Inter-Am. Ct. H.R. (ser. A) No. 4, ¶ 55 (January 19, 1984).

⁷ See Charter of the Organization of American States, Apr. 30, 1948, 1609 U.N.T.S. 119.

⁸ American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OAS/Ser.L/V/II.4 Rev. 9 (2003), 43 Am. J. Int’l L. Supp. 133 (1949) [hereinafter American Declaration]. The American Declaration constitutes a source of international obligations for the Member States of the OAS. See Roach & Pinkerton v. United States, Case 9647, Inter-Am. Comm’n H.R., Res. No. 3/87, OEA/Ser.L/V/II.71, doc. 9 rev. 1 ¶¶ 46-49 (1987); Ferrer-Mazorra et al. v. United States, Case 9903, Inter-Am. Comm’n H.R., Report No. 51/01, OEA/Ser.L/V/II.111, doc. 20 rev. (2001); 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, Advisory Opinion OC-10/89, Inter-Am. Ct. H.R. (ser. A) No. 10, ¶¶ 35-45 (Jul. 14, 1989)

⁹ Coard et al. v. United States, Case 10.951, Inter-Am. Comm’n H.R., Report No. 109/99, OEA/Ser.L/V/II.106, doc. 6 rev. (1999).

Similarly, Article 26 of the International Convention on Civil and Political Rights (ICCPR) provides: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹⁰ The Human Rights Committee has interpreted Article 26 as setting forth a general ban on discrimination, without any regard for the status of the individuals concerned. The application of the principle of non-discrimination contained in Article 26 of the ICCPR is not limited to those rights which are provided for in the Covenant, and extends to prohibit discrimination in law or in fact in any field regulated and protected by public authorities.

The ICCPR’s provisions on equality are mirrored in the International Covenant on Economic, Social and Cultural Rights (ICESCR), which states in Article 3 that “[t]he States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.”¹¹ Similarly, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) guarantees equality before the law. Article 2 of CERD provides:

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races.
2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.¹²

Article 5 of CERD provides a more specific guarantee of equality, stating that “In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law.”¹³

The principle of equality also pervades the Universal Declaration of Human Rights (UDHR).¹⁴ Article 2(1), for example, states that “Everyone is entitled to all the rights and freedoms set forth

¹⁰ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. The Dominican Republic ratified the ICCPR on January 4, 1978.

¹¹ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

¹² International Convention on the Elimination of All Forms of Racial Discrimination, art. 2, Mar. 7, 1966, 660 U.N.T.S. 195.

¹³ *Id.*, art. 5.

¹⁴ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR]. Many commentators are of the view that the UDHR has become part of international

in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

3. *Equality and non-discrimination are now jus cogens norms binding on the Dominican Republic’s treatment towards all persons found on its territory.*

The Committee on the Elimination of Racial Discrimination Committee (CERD Committee) and the Human Rights Committee have affirmed that “[n]on-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitutes a basic and general principle relating to the protection of human rights.”¹⁵ These norms are binding on the Dominican Republic as a State Party to the cited treaties, and as *jus cogens* norms under customary international law.

In *Advisory Opinion OC-18* of September 17, 2003, the Inter-American Court ruled in a unanimous opinion that the principles of equality and non-discrimination are so widely recognized in international human rights instruments as to have attained the status of *jus cogens* peremptory status binding on all State action, irrespective of a State’s adoption of the relevant treaties.

It is worth quoting in full the Court’s finding in this regard:

The principle of equality before the law and non-discrimination permeates every act of the powers of the State, in all their manifestations, related to respecting and ensuring human rights. Indeed, this principle may be considered peremptory under general international law, inasmuch as it applies to all States, whether or not they are party to a specific international treaty, and gives rise to effects with regard to third parties, including individuals. This implies that the State, both internationally and in its domestic legal system, and by means of the acts of any of its powers or of third parties who act under its tolerance, acquiescence or negligence, cannot behave in a way that is contrary to the principle of equality and non-discrimination, to the detriment of a determined group of persons. Accordingly, this Court considers that the principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws... This principle (equality and non-discrimination) forms part of general international law. At the

customary law. *See, e.g.*, Report of the Representative of the Secretary-General, Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission: Human Rights, Mass Exoduses and Displaced Persons, ¶ 15, Comm’n on Human Rights, U.N. Doc. E/CN.4/1996/52/Add.2 (Dec. 5, 1995).

¹⁵ Human Rights Comm., General Comment No. 18: Non-discrimination, ¶¶ 1, 3 (1990), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), at 195 (May 27, 2008); *see* Comm. on the Elimination of Racial Discrimination, General Recommendation XIV (42) on article 1, paragraph 1, of the Convention, ¶ 1 (1993), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II), at 277 (May 27, 2008).

existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*.”¹⁶

The Inter-American Court has affirmed *Advisory Opinion No. 18* in several judgments. In its extensive interpretation of Article 24 of the American Convention, the Court in *Yatama vs. Nicaragua* drew on the Advisory Opinion to conclude:

At the current stage of the evolution of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*. The juridical framework of national and international public order rests on it and it permeates the whole juridical system.¹⁷

The principle was confirmed again in *Case of the Mapiripán Massacre vs. Colombia*:

[T]he principle of equality and non-discrimination ... has the nature of *jus cogens* and is crucial to safeguard human rights both under international law and under domestic venue, and which impregnates all actions by State power, in all its expressions.¹⁸

Citing both *Advisory Opinion No. 18* and *Yatama vs. Nicaragua*, the Court in *Case of the Girls Yean and Bosico vs. Dominican Republic* upheld the *jus cogens* nature of non-discrimination:

The Court considers that the peremptory legal principle of the equal and effective protection of the law and non-discrimination determines that, when regulating mechanisms for granting nationality, States must abstain from producing regulations that are discriminatory or have discriminatory effects on certain groups of population when exercising their rights.¹⁹

In the *Case of the Girls Yean and Bosico*, the Court observed the existence of a general climate of discrimination in the Dominican Republic against people of Haitian descent. The Court noted that most of the Haitians and Dominicans of Haitian origin live “in conditions of poverty” in areas with little access to basic public services.²⁰

The Court also quoted from the 2005 report by the Office of the United Nations Development Programme (UNDP) on the Dominican Republic, which stated that:

¹⁶ Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶¶ 100-01 (Sep. 17, 2003); *see also* Sarah H. Cleveland, Recent Opinion, 99 Am. J. Int’l L. 460, 460-61 (2005).

¹⁷ *Yatama v. Nicaragua*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 127, ¶ 184 (Jun. 23, 2005) (citation omitted).

¹⁸ *Mapiripán Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶ 178 (Sep. 15, 2005).

¹⁹ *The Girls Yean & Bosico v. Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 141 (Sep. 8, 2005).

²⁰ *Id.*, ¶ 109(2).

Haitians live in the country in very precarious conditions of extreme poverty. Furthermore, most of them are undocumented and must face a generally hostile political and social situation, without the possibility of legal assistance and with limited access to health, sanitation and education services, and this includes the children of Haitians, who have been born in the country. It should be noted that the constraints to access to public services and the problem of lack of documentation are general among the poorest segments of the Dominican population. ... Regarding Haitian immigration, our information confirms the conditions of their incorporation into sectors of the labor market assigned to this group of immigrants, ... characterized by low salaries and appalling working conditions with low technology, known internationally as the three Ds: dirty, dangerous, demanding. Evidently, these are not precisely acceptable conditions from a human development perspective.²¹

The Court noted that in 2002, the Dominican Republic had assured the UNDP that its “greatest concern”²² was “to combat exclusion and social inequality by seeking mechanisms to integrate society as a whole and ensure that anti-Haitian practices are a thing of the past.”²³ Despite such assurances, this climate of discrimination against people of Haitian descent has endured, exemplified by the case at hand, and in contravention of the *jus cogens* norms of equality and non-discrimination that are so central to this Court’s jurisprudence.

4. *The Dominican Republic’s obligations to treat all persons equally and without discrimination apply to all persons found on its territory, under all circumstances, and without exception for irregular migrants, border crossers, or putative refugees.*

Human rights instruments provide protection for undocumented persons and irregular migrants through the general provision that "all persons" are equal before the law and entitled to the instruments’ protections.²⁴ The HR Committee has concluded that most of the provisions of the ICCPR apply to all persons found in a State's territory, including those who are not legally present.²⁵ General Comment 15 establishes that the enjoyment of the rights recognized by the ICCPR is not limited to the citizens of States parties, but is accessible to all individuals irrespective of their nationality or statelessness, including those requesting asylum, refugees, migrant workers and other persons who are within the territory or subject to the jurisdiction of the State party. In the Committee’s words: “[T]he

²¹ *Id.*, ¶ 109(3) (citing UNITED NATIONS, UNITED NATIONS DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT OFFICE OF THE DOMINICAN REPUBLIC, INFORME NACIONAL DE DESARROLLO HUMANO: HACIA UNA INSERCIÓN MUNDIAL INCLUYENTE Y RENOVADA, 121, 139, 141 222 and 143 (2005).

²² *Id.*, ¶ 109(4).

²³ *Id.*, (citing United Nations, Human Rights Committee, Comments by the Government of the Dominican Republic on the Concluding Observations of the Human Rights Committee, ¶ 46, UN Doc. CCPR/CO/71/DOM/Add.1 (May 28, 2002).

²⁴ See *Juridical Condition and Rights of Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶¶ 100-01 (Sep. 17, 2003); Sarah H. Cleveland, *Recent Opinion*, 99 Am. J. Int’l L. 460 (2005).

²⁵ Human Rights Comm., General Comment No. 15: The Position of Aliens Under the Covenant, ¶¶ 1-2 (1986), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), at 189 (May 27, 2008).

general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.”²⁶

General Comment 31 is very specific on the scope and application of the foregoing principle:

States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.²⁷

CERD Committee General Recommendation No. 30 further explains that under CERD, “differential treatment based on citizenship or immigration status will constitute discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and are not proportional to the achievement of this aim.”

In similar fashion, the Committee on Economic, Social and Cultural Rights (CESCR) noted in General Comment No. 20 (Non-Discrimination in Economic, Social and Cultural Rights [10/06/2009]) that “[t]he Covenant rights apply to everyone including non-nationals, such as refugees, asylum-seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status and documentation.”²⁸

Based on a review of international human rights law, including General Comment 15 of the Human Rights Committee, the Special Rapporteur on the Rights of Non-Citizens has concluded that “all persons should by virtue of their essential humanity enjoy all human rights unless exceptional distinctions, for example, between citizens and non-citizens, serve a legitimate State objective and are proportional to the achievement of that objective. For example, non-citizens should enjoy freedom from arbitrary killing, inhuman treatment, slavery, forced labour, child labour, arbitrary arrest, unfair trial, invasions of privacy, *refoulement* and violations of humanitarian law.”²⁹

²⁶ *Id.*, ¶¶ 1-2.

²⁷ Human Rights Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, ¶ 10 (March 29, 2004), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), at 245 (May 27, 2008).

²⁸ Comm. on Econ., Soc. and Cultural Rights, General Comment No. 20, ¶ 30, U.N. Doc. E/C.12/GC/20 (July 2, 2009).

²⁹ Special Rapporteur on the Rights of Non-Citizens, *Prevention of Discrimination*, Econ. & Social Council, U.N. Doc. E/CN.4/Sub.2/2003/23, at 2 (May 26, 2003); *see also* Comm. on the Elimination of Racial Discrimination, General Recommendation No. 30 (Oct. 1, 2004), *reprinted in* Compilation of General Comments and General

Consistent with these conclusions, the Inter-American Court in *Advisory Opinion OC-18* of September 17, 2003, found that nondiscrimination prohibits the denial of human rights to aliens on the basis of their migratory status. While the Court ruled that States may distinguish between migrants and nationals, it stressed that such distinctions must be "reasonable, objective, proportionate and [must] not harm human rights."³⁰ The Court ultimately held that "the general obligation to respect and ensure human rights binds States, regardless of any circumstance or consideration, including a person's migratory status."³¹

The opinion goes considerably further than previous pronouncements in guaranteeing fundamental human rights protection to undocumented immigrants, and in "the breadth of the rights [it deems] sufficiently fundamental to preclude discrimination on the basis of immigration status."³²

B. The Dominican Republic's obligations to protect the rights of migrants on an equal basis and without discrimination directly affected the fundamental rights of the victims of this massacre.

The Haitian victims of the events of the 18th of June 2000 claim to have been attacked, shot, killed or injured without provocation, and the survivors treated as non-persons, simply for crossing the Dominican-Haitian border. Such treatment impinged on the victims' most basic and inalienable rights under the American Convention and under the ICCPR. The Dominican Republic, whose authorities were responsible for these actions, is a party to both of these instruments, and as such is accountable to this Court.³³

1. *The Dominican Republic's actions impinged on the victims' fundamental right to life under the American Convention and the International Covenant on Civil and Political Rights.*

The victims who lost their lives at the hands of Dominican soldiers were deprived of the right to life, a core protected right under the American Convention and the ICCPR. Amongst the victims were two Haitian minors, Roland Israel and Sonide Nora, ages 14 and 16 respectively, who were seriously injured by the Dominican forces.

Article 4 of the American Convention guarantees the right to life as a non-derogable principle: "Every person shall have the right to have his life respected. This right shall be protected by law, and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."³⁴ Under this Court's jurisprudence and the interpretation of the American Convention,

Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. II), at 301 (May 27, 2008).

³⁰ Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 119 (Sep. 17, 2003).

³¹ *Id.*, ¶ 106.

³² Sarah H. Cleveland, Recent Opinion, 99 Am. J. Int'l L. 460, 463 (2005).

³³ The Dominican Republic acceded to the ICCPR on January 4, 1978, and ratified the American Convention on January 21, 1978.

³⁴ American Convention, *supra* note 3, art. 27.

Article 4 applies without distinction to aliens and irregular immigrants. The article uses the language “every person” and “no one” in sub-section (1). In contrast to, for example, Article 23, which uses the words ‘every citizen,’ Article 4 applies to everyone, or ‘all persons subject to the [‘State parties] jurisdiction,’ as framed in Article 1.

Interpreting the meaning of ‘arbitrary deprivation’ as relevant to the specific facts of this case, the Court has placed affirmative duties on States to take reasonable steps and adopt proper measures to avoid the taking of life by its police and security forces.³⁵ This Court has also, in the context of Article 4, remonstrated against State police shooting at unarmed people, claiming that by doing so they are engaging in excessive force prohibited by this provision.³⁶

As this Court has previously stated in the *Case of the Miguel Castro-Castro Prison*,³⁷ the *Case of the Pueblo Bello Massacre*,³⁸ and the *Case of Huilca-Tecse*,³⁹ the right to life is at the center of every other right. If this right is not respected, the other rights under the American Convention cannot be realized.⁴⁰ This Court has also articulated the full scope of the right in a number of other cases.⁴¹

The Dominican Republic is also bound by the prohibition against arbitrary deprivation of life under ICCPR Article 6, which closely mirrors Article 4 of the American Convention. Art. 6(1) provides: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.”⁴² The Human Rights Committee has interpreted the positive obligations on States under this Article in General Comment 6: “The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the

³⁵ *Montero-Aranguren et al. v. Venezuela*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 150, ¶ 64 (July 5, 2006); *Ximenes-Lopes v. Brazil*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 149, ¶ 125 (July 4, 2006); *Baldeón-García v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 147, ¶ 83 (Apr. 6, 2006); *see also* Human Rights Comm., General Comment No. 6, ¶ 3 (Apr. 30, 1982), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), at 176 (May 27, 2008); Human Rights Comm., General Comment No. 14 (Nov. 9, 1984), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), at 188 (May 27, 2008).

³⁶ INTER-AM. COMM’N ON HUMAN RIGHTS, REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE DOMINICAN REPUBLIC ¶ 144, OEA/Ser.L/V/II.104, Doc. 49 rev. 1 (Oct. 7, 1999) (citing the 1997 events involving Cristian Sánchez).

³⁷ *Miguel Castro-Castro Prison v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 160, (Nov. 25, 2006).

³⁸ *Pueblo Bello Massacre v. Colombia*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 140, (Jan. 31, 2006).

³⁹ *Huilca-Tecse v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 121, (Mar. 3, 2006).

⁴⁰ *See Miguel Castro-Castro Prison*, Inter-Am. Ct. H.R. (ser. C) No. 160, ¶ 237; *Pueblo Bello Massacre*, Inter-Am. Ct. H.R. (ser. C) No. 140, ¶ 120; *Huilca-Tecse*, Inter-Am. Ct. H.R. (ser. C) No. 121, ¶ 65.

⁴¹ *See, e.g., Vargas Areco v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 155, ¶ 75 (Sept. 26, 2006); *Ituango Massacres v. Colombia*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 148, ¶ 130 (July 1, 2006); *Sawhoyamaya Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 152 (Mar. 29, 2006).

⁴² ICCPR, *supra* note 10, art. 6(1).

law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.”⁴³

Article 6 of the ICCPR, as Article 4 of the American Convention, fully applies to aliens and irregular migrants. Both articles use the terms ‘every one/every human being,’ and ‘no one’ in referencing the scope of application. In earlier Concluding Observations, the Human Rights Committee specifically pointed out that it was concerned that the human rights of Haitians were not fully respected in Dominican territory.⁴⁴

The Human Rights Committee has elaborated in a number of Concluding Observations about the steps that the Dominican Republic must take to respect, ensure and protect the right to life, and to guarantee punishment for violations of the right. In its 2001 Concluding Observations, the Human Rights Committee stated that the Dominican Republic “should take urgent steps to ensure respect for article 6 of the Covenant, to have those responsible for violations of the right to life guaranteed thereunder prosecuted and punished, and to make redress.”⁴⁵ The Human Rights Committee has related the Dominican Republic’s obligations under Article 6 to its obligations under Article 7 to prosecute and punish violators, requiring the Dominican Republic to “take prompt action to comply fully with article 7 of the Covenant and to have violations thereof investigated so that the culprits may be tried and punished by ordinary courts and redress provided.”⁴⁶

It is important to note that neither Article 6 of the ICCPR nor Article 4 of the American Convention have exceptions that apply in the present case. ICCPR Article 6 (2)-(6) relate to the death penalty and serious crimes of genocide, which are not relevant to this case. Article 4’s exception for the imposition of the death penalty does not apply in this case. Both on the facts of this case -- in which no claim for capital punishment has been made -- and in the Dominican Republic’s specific circumstances, the exception in Articles 4(2)-(6) is inapplicable.⁴⁷ The guarantee of the right to life is absolute, and there is no possible justification for the Dominican forces to have shot a truck full of unarmed children, men and women—including a pregnant

⁴³ Human Rights Comm., General Comment No. 6, *supra* note 35, ¶ 3.

⁴⁴ Human Rights Comm., Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Comments of the Human Rights Committee, ¶ 5, U.N. Doc. CCPR/C/79/Add.18 (May 5, 1993) (“The Committee expresses its concern over the lack of protection afforded to Haitians living or working in the country from such serious human rights abuses as forced labour and cruel, inhuman or degrading treatment. The Committee expresses its concern over the fact that the protection of the fundamental human rights of foreigners is subject to reciprocity.”).

⁴⁵ Human Rights Comm., Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Dominican Republic, ¶ 8, U.N. Doc. CCPR/CO/71/DOM (Apr. 26, 2001).

⁴⁶ *Id.*, ¶ 9. In the same Concluding Observations, the HR Committee noted “with equal concern of the reports of extrajudicial executions of prisoners in the custody of the State party [the Dominican Republic,] in its prisons and of deaths at the hands of the National Police, the Armed Forces and the National Drug Control Office owing to the excessive use of force and the apparent impunity that they enjoy.” *Id.*, ¶ 8.

⁴⁷ The Dominican Republic abolished the death penalty in 1966. Amnesty International, *Abolitionist and Retentionist Countries*, <http://www.amnesty.org/en/death-penalty/abolitionist-and-retentionist-countries> (last visited March 19, 2012).

woman—killing seven and wounding thirty, simply on the assumption that they were Haitian and irregular border crossers.⁴⁸

The Inter-American Court itself has said:

Migrants are generally in a vulnerable situation as subjects of human rights; they are in an individual situation of absence or difference of power with regard to non-migrants (nationals or residents). This situation of vulnerability 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. This leads to the establishment of differences in their access to the public resources administered by the State.

Cultural prejudices about migrants also exist that lead to reproduction of the situation of vulnerability; these include ethnic prejudices, xenophobia and racism, which make it difficult for migrants to integrate into society and lead to their human rights being violated with impunity.⁴⁹

The Dominican Republic's commitments under the American Convention and the ICCPR provide no justification for such deprivations of the right to life.

2. *The Dominican Republic's actions impinged on the victims' fundamental right to humane treatment under the American Convention and the International Covenant on Civil and Political Rights.*

Aside from the fundamental right to life, the rights of the victims in this case to humane treatment under the American Convention and the ICCPR were also affected. Both of these instruments prohibit abuse that may violate a person's "humanity" or that disrespects "the inherent dignity of the human person."⁵⁰ Article 5(1) of the American Convention states that "Every person has the right to have his physical, mental, and moral integrity respected," while 5(2) states that "No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."⁵¹ Article 5 requires a standard of humane treatment that

⁴⁸ It could be added that the arguments according to which the migrants may have been carrying drugs or weapons are not supported by any evidence. (Refer to Plaintiff's Legal Arguments And Evidence Memo, ¶¶ 33-68).

⁴⁹ Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 112-113 (Sep. 17, 2003). *See also* G.A. Res. 54/166, U.N. GAOR, 54th Sess., U.N. Doc. A/RES/54/166, at 2 (Feb. 24, 2000) ("*Bearing in mind* the situation of vulnerability in which migrants frequently find themselves, owing, *inter alia*, to their absence from their State of origin and to the difficulties they encounter because of differences of language, custom and culture, as well as the economic and social difficulties and obstacles for the return to their States of origin of migrants who are non-documented or in an irregular situation.").

⁵⁰ *Tibi v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 150 (Sept. 7, 2004).

⁵¹ American Convention, *supra* note 3, art. 5.

applies without distinction based on race, color, national origin or other status, such as migratory status.⁵²

These principles have been further interpreted in this Court's jurisprudence relevant to the facts of this case. For example, this Court has established that someone unlawfully detained is in a particularly vulnerable situation that creates "a real risk that his other rights, such as the right to humane treatment and to be treated with dignity, will be violated."⁵³ This Court has also established that when a person's detention itself is illegal, "a brief period of detention is enough for it to constitute an infringement of his mental and moral integrity according to the standards of international human rights law."⁵⁴ When such circumstances occur, "it is possible to infer, even if there is no additional evidence in this regard, that treatment of the victim during his isolation was inhuman, degrading, and extremely aggressive."⁵⁵ Moreover, the Court has pointed out, in a decision uniquely relevant here, that pregnancy is a state of "particular vulnerability," requiring heightened protection under Article 5.⁵⁶

The ICCPR also places obligations on the Dominican Republic to provide humane treatment to individuals such as the victims in this case. Under ICCPR Article 10(1), "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."⁵⁷ The Human Rights Committee has stated in its General Comment 21 that Article 10 requires that all persons deprived of their liberty "enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment."⁵⁸

The Human Rights Committee has previously found the Dominican Republic in violation of Article 10 concerning its use of incommunicado and arbitrary detention, as well as the conditions of detention. The inhumane treatment, arbitrary detention and conditions of detention to which the Haitian victims were subjected in this case by Dominican authorities, are similar to conditions that have been the subject of sustained criticism by the Human Rights Committee. In its Concluding Observations to the Dominican Republic's Report in 2001, the Committee insisted that the Dominican Republic "should revise the law to ensure that detention

⁵² American Convention, *supra* note 3, art. 1.

⁵³ *Gómez Paquiyauri Brothers v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 110, ¶ 108 (July 8, 2004); *Urrutia v. Guatemala*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 103, ¶ 87 (Nov. 27, 2003); *Sánchez v. Honduras*, Preliminary Objection, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 99, ¶ 96 (June 7, 2003).

⁵⁴ *Bámaca Velásquez v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 128 (Nov. 25, 2000); *Cantoral Benavides v. Peru*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 69, ¶¶ 82-83 (Aug. 18, 2000); *Villagran-Morales et al. v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶¶ 162-163 (Nov. 19, 1999).

⁵⁵ *Bámaca Velásquez*, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 150; *Cantoral Benavides*, Inter-Am. Ct. H.R. (ser. C) No. 69, ¶¶ 83-84, 89; *Villagran-Morales et al.*, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 162.

⁵⁶ This court has said that pregnancy is considered a state of special vulnerability. *Gelman v. Uruguay*, Merits and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 221, ¶ 97 (Feb. 24, 2011).

⁵⁷ ICCPR, *supra* note 10, art. 10.

⁵⁸ Human Rights Comm., General Comment No. 21, ¶ 3 (Apr. 10, 1992), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), at 202 (May 27, 2008).

incomunicado does not violate article...10 of the Covenant.”⁵⁹ Regarding the inhumane conditions of prisons, such as where the victims here were held, the Committee has said that “the situation in prisons and other places of detention has worsened owing to...deplorable sanitary conditions, [and] failure to separate juveniles from adults and men from women... The State party should establish institutional mechanisms to supervise prison conditions with a view to complying with article 10 of the Covenant and to investigate prisoners’ complaints.”⁶⁰ And, in the same Concluding Observations, the Human Rights Committee has condemned the inhumane conditions in Dominican prisons, including claims of torture: “Despite being prohibited by the [Dominican Republic’s] Constitution (art. 8.1), torture is widespread, occurring in prisons and elsewhere, that not all its forms are classified as crimes under the law and that no independent body exists to investigate the many complaints of torture and cruel, inhuman or degrading treatment.”⁶¹

In the same way that the Inter-American Court clarified Article 5 of the American Convention, the Human Rights Committee has made clear that Article 10 of the ICCPR “must be applied without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁶² The Human Rights Committee has been particularly concerned about the application of Article 10 to Haitian migrants. In its 2001 Concluding Observations, the Committee noted the Dominican Republic’s “failure to protect Haitians living or working in the Dominican Republic from serious human rights abuses such as forced labour and cruel, inhuman or degrading treatment.”⁶³ These violations remain unaddressed, and are exemplified in the petition in this case.

Finally, neither Article 5 of the American Convention nor Article 10 of the ICCPR permit derogations in circumstances relevant here. This Court has said that international law absolutely forbids all forms of torture, both physical and psychological, and this system is now part of *jus cogens*.⁶⁴ This Court has also emphasized that the “prohibition of torture is complete and non-derogable, even under the most difficult circumstances, such as war, the threat of war, the struggle against terrorism, and any other crimes, state of siege or of emergency, internal disturbances or conflict, suspension of constitutional guarantees, domestic political instability, or other public disasters or emergencies.”⁶⁵

In the Guayubin Massacre case, the surviving victims claim that their physical, mental and moral integrity was violated. They claim they were held in deplorable conditions for over 30 hours by Dominican authorities, and were threatened with forced labor such as having to clean toilets or

⁵⁹ Human Rights Comm., Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Dominican Republic, ¶ 12, U.N. Doc. CCPR/CO/71/DOM (Apr. 26, 2001).

⁶⁰ *Id.*, ¶ 14.

⁶¹ *Id.*, ¶ 9.

⁶² Human Rights Comm., General Comment No. 21, *supra* note 58, ¶ 4.

⁶³ Human Rights Comm., Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Dominican Republic, ¶ 17, U.N. Doc. CCPR/CO/71/DOM (Apr. 26, 2001).

⁶⁴ *Tibi v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 143 (Sept. 7, 2004).

⁶⁵ *Id.*

peel bananas. The victims also claim that their treatment was cruel and inhumane, and for some, that it was torture. Not only were the victims shot at without provocation and forced to undergo a violent truck accident, but children and women were subjected to particular cruelty due to their vulnerability. Silvie Thermeus, who was 16 weeks pregnant, was not given any special accommodations despite her pregnancy, and was kept in the same deplorable conditions as the other survivors. All of the detained women and children (Roland Israel, aged 14, and Sonide Nora, aged 16) were similarly mistreated. The survivors of the accident were also forced to carry the corpses of the deceased victims, some being members of their own family, immediately after the accident. Finally, at the end of their ordeal, they were forced to pay for their release and then summarily and collectively expelled from the Dominican Republic.

In this case, the deceased victims' physical, mental and moral integrity was also disrespected. After being fatally wounded without reason, the bodies of the deceased victims were thrown on the ground with torn clothing and with no respect for their lives or for their family. The families of the deceased Haitian immigrants were then refused repatriation due to "costly administrative obstacles" and, for practical purposes, denied the opportunity to be present at the burial of their deceased family members by the Dominican government who buried the bodies just two days after the massacre. This hasty mass burial was made in a common grave, and the entire process denied the families any opportunity to grieve, or to find answers to the manner of the deaths of their loved ones.⁶⁶

3. *The Dominican Republic's actions impinged on the victims' right to Juridical Personality — their right to access rights under existing law.*

Both the American Convention and the ICCPR guarantee the right to juridical personality. Article 3 of the American Convention provides that "Every person has the right to recognition as a person before the law." Likewise, Article 16 of the ICCPR states that "Everyone shall have the right to recognition everywhere as a person before the law."

The Inter-American Court has interpreted the right to juridical personality to mean that individuals everywhere are entitled to basic civil rights:

[Juridical personality] should be interpreted in the light of the provisions of Article XVII of the American Declaration of the Rights and Obligations of Man, which says textually: "Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights". The right to the recognition of juridical personality implies the capacity to be the holder of rights (capacity of exercise) and obligations; the violation of this recognition presumes an absolute disavowal of the possibility of being a holder of such rights and obligations.⁶⁷

⁶⁶ See Cançado-Trindade, Separate Opinion at ¶¶ 67-81, in *Moiwana Village v. Suriname*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005) (discussing the concept of the right to an after-life project, violated when corpses are disposed of improperly).

⁶⁷ *Bamaca-Velasquez v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 179 (Nov. 25, 2000).

Moreover, the right to juridical personality is non-derogable, as explicitly set forth in Article 27(2) of the American Convention.⁶⁸ A State may not suspend or violate an individual's right to juridical personality due to war, public danger or any threat to public security; the individual entitlement to juridical personality requires access to his or her fundamental civil rights under all circumstances.⁶⁹ From the beginning of their ordeal, the detained Haitian nationals claim they were treated worse than convicted criminals, without any opportunity to file for *habeas corpus*, for substantive relief from expulsion such as political asylum, or even to appeal their arrests to the competent authorities. The facts in this case implicate the Dominican Republic's obligation to guarantee juridical personality to all individuals, a core responsibility under international law.⁷⁰

C. The rights to equality and non-discrimination integrally relate to other protected rights, such as the right to access status determination under the Refugee Convention and to protections for unauthorized migrants.

1. *Non-refoulement and the right to refugee status determination.*

The survivors of the Guayubin Massacre allege that they were summarily rounded up and transferred to detention centers, whereupon they were detained and eventually expelled arbitrarily from the Dominican Republic. They further allege that throughout this process no attempt was made to determine their status, although among them may well have been persons with legitimate claims to refugee or other protected international legal status.⁷¹

As putative refugees, the victims had two fundamental rights: the right to *non-refoulement* and the right to individual refugee status determinations. The principle of *non-refoulement* has become a cornerstone of international refugee law. Indeed it is widely considered to be customary international law.⁷² The prohibition against *refoulement* is enshrined in Article 33 of the 1951 Convention relating to the Status of Refugees (Refugee Convention), which is also binding on States Parties to the 1967 Protocol relating to the Status of Refugees. Article 33(1) of the 1951 Convention provides:

No Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.

⁶⁸ American Convention, *supra* note 3, art. 27(2).

⁶⁹ *See id.*, art. 27(1)-(2).

⁷⁰ *See* Report of the Independent Expert on the Situation of Human Rights in Haiti, *Forced Returns of Haitians from Third States*, ¶¶ 30-33, 54, U.N. Doc. A/HRC/20/35/Add.1 (Jun. 4, 2012) (underscoring the rights to due process of Haitian nationals and the Dominican Republic's longstanding practice of expelling Haitians in a violent and arbitrary manner).

⁷¹ *Nadege Dorzema et al. v. Dominican Republic (Guayubin Massacre)*, Petition 1351-05, Rep. No. 95/08, OEA/Ser.L/V/II.134, doc. 5 rev. 1, ¶ 12 (2008).

⁷² *See* for example Ministerial Meeting of States Parties to the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, Dec. 12–13, 2001, Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, ¶ 4, U.N. Doc. HCR/MMSP/2001/09 (Jan. 16, 2002) (noting “the continuing relevance and resilience of this international regime of rights and principles, including at its core the principle of *non-refoulement*, whose applicability is embedded in customary international law”).

The prohibition against *refoulement* is triggered as soon as a refugee or asylum seeker arrives at the frontiers of a given State. It at least impliedly requires authorities to undertake a status determination procedure, for without a right of access to asylum procedures for the purpose of refugee status determination, the principle of *non-refoulement* is rendered meaningless.

The United Nations High Commissioner for Refugees (UNHCR) Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations explains the right to determination of refugee status in the following way:

The principle of *non-refoulement* as provided for in Article 33(1) of the 1951 Convention does not, as such, entail a right of the individual to be granted asylum in a particular State. It does mean, however, that where States are not prepared to grant asylum to persons who are seeking international protection on their territory, they must adopt a course that does not result in their removal, directly or indirectly, to a place where their lives or freedom would be in danger on account of their race, religion, nationality, membership of a particular social group or political opinion.¹³ As a general rule, in order to give effect to their obligations under the 1951 Convention and/or 1967 Protocol, States will be required to grant individuals seeking international protection access to the territory and to fair and efficient asylum procedures.⁷³

The right to status determination applies to any person who is seeking protection, whether or not his or her status has been formally declared:

Given that a person is a refugee within the meaning of the 1951 Convention as soon as he or she fulfills the criteria contained in the refugee definition, refugee status determination is declaratory in nature: a person does not become a refugee because of recognition, but is recognized because he or she is a refugee. It follows that the principle of *non-refoulement* applies not only to recognized refugees, but also to those who have not had their status formally declared.⁷⁴

Beyond Article 33 of the Refugee Convention, Article XXVII of the American Declaration reads: "Every person has the right, in case of pursuit not resulting from ordinary crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements."⁷⁵

In its response to *Haitian Centre for Human Rights et al. v. United States*, the Inter-American Commission issued the following statements regarding article XXVII of the American Declaration:

⁷³ United Nations High Commissioner for Refugees, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, ¶ 8 (Jan. 26, 2007).

⁷⁴ *Id.*, ¶ 6.

⁷⁵ American Declaration, *supra* note 8, art. XXVII.

The Commission believes that international law has developed to a level at which there is recognition of a right of a person seeking refuge to a hearing in order to determine whether that person meets the criteria in the Convention.⁷⁶

The Commission finds that the United States summarily interdicted and repatriated Haitian refugees to Haiti without making an adequate determination of their status, and without granting them a hearing to ascertain whether they qualified as "refugees." The Commission also finds that the dual criteria test of the right to "seek" and "receive" asylum as provided by Articles XXVII in "foreign territory" (in accordance with the laws of each country and with international agreements) of the American Declaration has been satisfied. Therefore, the Commission finds that the United States breached Article XXVII of the American Declaration.⁷⁷

With respect to Article 33 of the Refugee Convention, the Inter-American Commission similarly concludes: "the right to seek asylum constitutes, at least, the right to advance a claim."⁷⁸

Based upon these findings the Inter-American Commission, in the *Haitian Centre for Human Rights et al. v. United States* case, called upon the United States "to ensure that Haitians who are already in the United States are not returned to Haiti without a determination being made as to whether they qualify for refugee status, under the Protocol Relating to the Status of Refugees, or as asylees under the American Declaration of the Rights and Duties of Man."⁷⁹

Taken together or separately, the Refugee Convention and the American Convention establish a right to refugee status determination. The victims of the Guayubin Massacre were denied such a right. In fact, they were denied the right to claim any status—they were given no recognition as human persons. The Dominican Republic's commitments to the American Convention and the Refugee Convention are incompatible with such treatment.

2. *Protection against arbitrary detention.*

Closely related to the right to refugee status determination is the protection against arbitrary detention. Article 31 of the 1951 Convention Relating to the Status of Refugees provides as follows:

1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

⁷⁶ *Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Inter-Am. Comm. H.R., Rep. No. 51/96, OEA/Ser.L/V/II.95 Doc. 7 rev., 550, ¶ 155 (1996).

⁷⁷ *Id.*, ¶ 163.

⁷⁸ *Id.*, ¶ 143.

⁷⁹ *Id.*, ¶ 17.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country.

The Dominican Republic's obligations under Article 31 of the Refugee Convention were triggered when it detained the survivors without examining and determining their refugee status. As Professor Goodwin-Gill explains:

In most cases, only if an individual's claim to refugee status is examined before he or she is affected by an exercise of State jurisdiction (for example, in regard to penalization for 'illegal' entry), can the State be sure that its international obligations are met. Just as a decision on the merits of a claim to refugee status is generally the only way to ensure that the obligation of *non-refoulement* is observed, so also is such a decision essential to ensure that penalties are not imposed on refugees, contrary to Article 31 of the 1951 Convention.⁸⁰

Professor Goodwin-Gill further explains that to impose penalties (such as detention) without regard to an individual's refugee status also violates the obligation of the State under Article 1 of the American Convention to ensure and to protect the human rights of everyone within its territory or subject to its jurisdiction.⁸¹ In its Guidelines to the Detention of Asylum Seekers,⁸² the UNHCR affirms that Article 31 applies not only to recognized refugees "but also to asylum-seekers pending determination of their status."⁸³ This is so because "recognition of refugee status does not make an individual a refugee but declares him to be one."⁸⁴

UNHCR's Guidelines underscore that detention should only be resorted to when absolutely necessary. Grounds of necessity include: to verify identity; to determine the elements on which

⁸⁰ Guy Goodwin-Gill, *Article 31 of the 1951 Convention relating to the Status of Refugees: Non-penalisation, Detention, and Prosecution*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 187 (Feller, Turk & Nicholson eds., 2003). Paper commissioned by UNHCR as a background paper for an expert roundtable discussion on Art. 31 of the 1951 Convention Relating to the Status of Refugees organized as part of the Global Consultations on International Protection in the context of the fiftieth anniversary of the 1951 Convention.

⁸¹ *Id.* Goodwin-Gill further notes that this duty is recognized in Art. 2(1) of the 1966 International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171 ('Each State Party . . . undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . .'); in Art. 1 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), ETS No. 5 ('The . . . Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'); and in Art. 1 of the American Convention ("The . . . Parties . . . undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction [their] free and full exercise.").

⁸² United Nations High Commissioner for Refugees, *Guidelines on Applicable Criteria and Standards relating to the Detention of Asylum-Seekers* (Feb. 26, 1999).

⁸³ *Id.*, ¶ 3.

⁸⁴ *Id.*

the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their identity documents or have used fraudulent documents; or to protect national security or public order. Finally, if justified, detention can only be imposed in a non-discriminatory manner.

The detention of the victims in this case did not meet these requirements and was not grounded in necessity. The State agents who detained the victims did not request their identity information, the courts did not examine their legality and no attempt was made to determine their nationality or refugee status. Moreover, given the historical treatment of Haitian citizens in the Dominican Republic (the petitioners describe their treatment as falling within “an overall pattern of abuse and discrimination suffered by Haitian citizens at the hands of Dominican Republic state agents”), there are serious grounds to believe that the victims’ detention was imposed in a discriminatory manner—in other words, just *because* they were Haitian.

Additionally, the victims also allege that they were not informed of the reasons for their detention. This makes the actions of the State party incompatible with UNHCR Guidelines, which state that if detained, asylum-seekers should be entitled to receive “prompt and full communication of any order of detention, together with the reasons for the order, and their rights in connection with the order, in a language and in terms which they understand.”⁸⁵ In this case, the victims were given no opportunity to apply for asylum or any other form of relief from detention or expulsion to which they may have been entitled, and no effort was made to communicate with them in their native language, whether Creole or French.

3. *Protection against arbitrary expulsion.*

UN Special Rapporteur on the Expulsion of Aliens, Maurice Kamto, claims that alongside the protection against arbitrary detention, Article 31 of the Refugee Convention constitutes the correlate obligation not to expel persons “who have not yet been granted refugee status and who might therefore find themselves in the receiving territory illegally — at least before their situation has been considered by the competent national authorities.”⁸⁶

The Global Commission on International Migration has given support to the principle of non-expulsion while refugee status is being determined. The Commission urges all States to establish fast, fair and efficient refugee status determination procedures, so that asylum-seekers are quickly informed of the outcome of their case. In particular, it recommends that:

In situations of mass influx, States should consider offering the new arrivals *prima facie* refugee status, a practice used to good effect for many years in Africa and developing countries in other regions.⁸⁷

⁸⁵ UNHCR, *The Detention of Refugees and Asylum Seekers by Reason of Their Unauthorised Entry or Presence* 4 (July 2007).

⁸⁶ Special Rapporteur on the Expulsion of Aliens, *Third Report on the Expulsion of Aliens*, ¶ 69, Int’l Law Comm’n, U.N. Doc. A/CN.4/581.

⁸⁷ GLOBAL COMMISSION OF INTERNATIONAL MIGRATION, *MIGRATION IN AN INTERCONNECTED WORLD: NEW DIRECTIONS FOR ACTION* 41, (2005).

In addition to principles relating to the expulsion of refugees or asylum seekers, international law guarantees certain protections against expulsion to all aliens, which, at least to a certain degree, extend to unauthorized migrants. While the right of a State to expel and exclude aliens is unquestionably a core aspect of State sovereignty, the exercise of this right is subject to limitations:

Just as the rules of international law regulate the power of States to determine the class of persons who shall be nationals, so too are limitations placed upon the discretionary competence of States in regard to the entry and expulsion of aliens. States retain a varying amount of freedom of action, but their powers are limited in extent and in the manner of exercise by the legal relations existing between States ... The validity of an exclusion or an expulsion must be determined in the light of the State's obligations, whether they derive from custom, treaty, or general principles of law.⁸⁸

Based on this principle, the United Nations General Assembly notes that the right of a State to expel aliens is "one of the most common examples given of an otherwise lawful right which may be exercised in an unlawful manner constituting an abuse of rights."⁸⁹ When expulsion is arbitrary, it is unlawful, and the prohibition against arbitrary expulsion is generally recognized as a limitation on the right of a State to expel aliens.⁹⁰

Article 13 of the ICCPR is quite clear on what constitutes arbitrary expulsion:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

The Human Rights Committee has interpreted this provision as a prohibition of arbitrary expulsions. In its General Comment No. 15, the Human Rights Committee stated that:

Article 13 directly regulates only the procedure and not the substantive grounds for expulsion. However, by allowing only those carried out 'in pursuance of a decision reached in accordance with law', its purpose is clearly to prevent arbitrary expulsions.⁹¹

This raises the issue of whether the principles relating to arbitrary expulsion should be limited to the expulsion of aliens who are lawfully present in the territory of another State or be extended to

⁸⁸ GUY S. GOODWIN-GILL, *INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES* 21 (1978).

⁸⁹ United Nations Secretariat, *Expulsion of Aliens*, Memorandum by the Secretariat, ¶ 10, Int'l Law Comm'n, U.N. Doc. A/CN.4/565 (July 10, 2006).

⁹⁰ *Id.*

⁹¹ Human Rights Comm., *General Comment No. 15: The Position of Aliens Under the Covenant*, ¶ 10 (1986), *reprinted in* *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), at 189 (May 27, 2008).

include illegal aliens who are physically present in the territory. While Article 13 of the ICCPR sets forth procedural guarantees with respect to the expulsion of aliens lawfully present in the territory of a State, the Human Rights Committee in General Comment 15 has considered that the procedural guarantees of this provision should also apply to a decision concerning the legality of an alien's entry or stay in the State:

The particular rights of article 13 [of the International Covenant on Civil and Political Rights] only protect those aliens who are lawfully in the territory of a State party. This means that national law concerning the requirements for entry and stay must be taken into account in determining the scope of that protection, and that illegal entrants and aliens who have stayed longer than the law or their permit allow, in particular, are not covered by its provisions. However, if the legality of an alien's entry or stay is in dispute, any decision on this point leading to his expulsion or deportation ought to be taken in accordance with article 13.⁹²

Further, the UN Special Rapporteur on the Rights of Non-Citizens, David Weissbrodt, has asserted that States may not arbitrarily exercise their right to require the departure of immigrants unlawfully present in their territory. He has argued out that illegal immigrants may not be treated as criminals:

There is a significant scope for States to enforce their immigration policies and to require departure of unlawfully present persons. That discretion is, however, not unlimited and may not be exercised arbitrarily. A State might require, under its laws, the departure of persons who remain in its territory longer than the time allowed by limited-duration permits. Immigrants and asylum-seekers, even those who are in a country illegally and whose claims are not considered valid by the authorities, should not be treated as criminals.⁹³

The United Nations General Assembly asserts that the failure of a State to give any reason for the expulsion of an alien may be viewed as evidence of arbitrary action.⁹⁴ The General Assembly's statement on Expulsion of Aliens quotes Oppenheim's International Law on the point:

While the failure of a state to advance any reason for the expulsion may not itself be a breach of any international legal obligation, the refusal to give reasons may lend support to a finding of arbitrariness in the expulsion.⁹⁵

Based on the foregoing, given the facts asserted, the Guayubin Massacre victims would appear to have been arbitrarily, and therefore illegally, expelled from the Dominican Republic. No attempt was made to establish their status—legal, refugee or otherwise—and no reasons were advanced

⁹² *Id.*, ¶ 9.

⁹³ Special Rapporteur on the Rights of Non-Citizens, *Prevention of Discrimination*, Econ. & Social Council, U.N. Doc. E/CN.4/Sub.2/2003/23, ¶ 29 (May 26, 2003).

⁹⁴ Special Rapporteur on the Expulsion of Aliens, *Third Report on the Expulsion of Aliens*, Int'l Law Comm'n, U.N. Doc. A/CN.4/581.

⁹⁵ Oppenheim's International Law, Vol. I: Peace, Parts 2 to 4, 943-44 (Jennings & Watts eds., 9th ed. 2008).

for their expulsion. The fact that the State agents did not request the victims' identification also underscores the arbitrary nature of their expulsion.

D. The violations of fundamental rights of the Haitian victims were a direct result of the Dominican Republic's militarization of border-crossing procedures and inspections of irregular migrants.

1. *From beginning to end of these events, the Dominican Republic substituted military process for the civil process that was due in order to protect the fundamental and jus cogens rights involved.*

Following the Dominican military's use of lethal force on the truck carrying the Haitian migrants, the survivors of the attack were subject to military procedures rather than the civil procedures they were entitled to under law. The driver of the truck alleges that he was captured and detained by military forces, which transported him to a national military department for interrogation; he was never turned over to civil authorities for questioning. Likewise, other survivors allege that Dominican soldiers forcibly detained them. At no time did military forces offer the victims legal justification for their detention or provide them the opportunity to appear before a judge, nor did they provide the Haitian detainees with information regarding their legal right to consular assistance.

The Inter-American Court recognizes that States are obliged to provide due process of law to all persons regardless of their status as migrants:⁹⁶

[D]ue process of law must be respected in any act or omission on the part of the State bodies in a proceeding, whether of an administrative, punitive or jurisdictional nature.⁹⁷

The Dominican Republic was therefore obliged to provide due process of law to all individuals within its territory affected by State actions, regardless of whether they were regular or irregular migrants.

a. Arbitrary Detention

The right to freedom from arbitrary detention is guaranteed under international law in both the American Convention and the ICCPR. In its Article 7 guarantee of the right to personal liberty and security, the American Convention provides in pertinent part that:

4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.

⁹⁶ Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 121 (Sep. 17, 2003).

⁹⁷ *Id.*, ¶ 123.

5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.⁹⁸

The Inter-American Court has stated that “any violation of subparagraphs 2 to 7 of Article 7 of the Convention necessarily entails the violation of Article 7(1) thereof, because the failure to respect the guarantees of the person deprived of liberty leads to the lack of protection of that person’s right to liberty.”⁹⁹ Moreover, the Inter-American Commission has acknowledged that preventive detention violates due process rights, stating that “detention without trial violates important rights such as the presumption of innocence.”¹⁰⁰ Indeed, the Inter-American Court has held that preventive detention should only be used in extraordinary circumstances because it is “the most severe measure that may be applied to the person accused of a crime ... in a democratic society.”¹⁰¹

Likewise, Inter-American law is clear that prolonged detention without trial or charge violates Article 7. The Court stated in *Bamaca-Velasquez v. Guatemala* that “[a]n individual who has been deprived of his freedom without any type of judicial supervision should be liberated or immediately brought before a judge, because the essential purpose of Article 7 of the Convention is to protect the liberty of the individual against interference by the State.”¹⁰² A detainee is therefore entitled to plead his case before a judge.¹⁰³

Article 7(5) of the American Convention requires that the detainee appear before a judge “promptly.” The Court has declared that “[p]rompt judicial control is a measure intended to avoid arbitrary or unlawful arrests, . . . ensuring that the accused is treated in a manner in keeping

⁹⁸ American Convention, *supra* note 3, art. 7.

⁹⁹ *Alvarez & Iniguez v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 170, ¶ 54 (Nov. 21, 2007).

¹⁰⁰ INTER-AM. COMM’N ON HUMAN RIGHTS, REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE DOMINICAN REPUBLIC, OEA/Ser.L/V/II.104, Doc. 49 rev. 1, ¶ 131 (Oct. 7, 1999).

¹⁰¹ *Tibi v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 114, ¶ 106 (Sep. 7, 2004).

¹⁰² *Bamaca-Velasquez v. Guatemala*, Merits, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70, ¶ 140 (Nov. 25, 2000).

¹⁰³ *See id.*, ¶ 143.

with the presumption of innocence.”¹⁰⁴ The length of detention is therefore not dispositive; what is important is whether the detainee is brought before a judge in a reasonably prompt manner.¹⁰⁵ Further, though the Inter-American Court acknowledges the authority of States to ensure domestic security and order, it has nonetheless cautioned against the use of military forces to curb domestic crimes and violence.¹⁰⁶ The Court specifically noted that “in some contexts and circumstances, a high military presence accompanied by the intervention of the Armed Forces in public security activities may entail the introduction of a risk to human rights.”¹⁰⁷ As a result, whenever possible, States should avoid using the military to fulfill States’ duties to protect and control their citizens: “[t]he strict fulfillment of the duty to prevent and protect the endangered rights must be assumed by the domestic authorities in observance of a clear demarcation between military and police duties.”¹⁰⁸ The Inter-American Commission concurs with this position, having found that “the armed forces are not properly trained to deal with citizen security; hence the need for an efficient civilian police force, respectful of human rights and able to combat citizen insecurity, crime and violence on the domestic front.”¹⁰⁹

The right to liberty and security of person is also guaranteed by Article 9 of the ICCPR, which further entitles anyone deprived thereof to due process of law:

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.
2. Anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

¹⁰⁴ Chaparro-Alvarez & Lapo-Iniguez v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 170, ¶ 81 (Nov. 21, 2007).

¹⁰⁵ See *id.*, ¶¶ 80-87 (holding that a brief detention without prior judicial order or notice of charges violates Article 7); see also, Bamaca-Velasquez v. Guatemala, *supra* note 102, ¶ 143 (holding that a four month detention without trial was arbitrary under Article 7); Tibi v. Ecuador, *supra* note 101, ¶¶ 111-22 (holding that detention without charge for eighteen months was arbitrary and illegal under Article 7).

¹⁰⁶ Cabrera Garcia & Montiel Flores v. Mexico, Preliminary Objection, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 220, ¶ 86-89 (Nov. 26, 2010).

¹⁰⁷ *Id.*, ¶ 86.

¹⁰⁸ *Id.*, ¶ 88.

¹⁰⁹ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON CITIZEN SECURITY AND HUMAN RIGHTS, OEA/Ser.L/V/II Doc. 57, ¶ 100 (Dec. 31, 2009).

4. Anyone who is deprived of liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.¹¹⁰

In addition to matters of arrest for charges levied against individuals, the Human Rights Committee has also addressed the topic of preventive detention. The Human Rights Committee clarified that anyone subject to preventive detention is still entitled to the due process rights set forth in Article 9, stating that the detention “must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4).”¹¹¹ It is clear, therefore, that due process must be provided to any detainees, whether formal charges have been pressed or they are in preventive custody.

Under the facts of this case, the Dominican Republic authorities incurred treaty obligations to provide due process of law to the Haitian migrants who were deprived of their liberty and personal security. The survivors of the Guayubin Massacre were arrested by military officers rather than civil police officers, were never informed of the charges against them, and, upon being detained by military forces and other State agents they were summarily and collectively ejected from the Dominican Republic without recourse to judicial or administrative courts. On the facts alleged, these victims were denied their rights to due process that are guaranteed to them, even as migrants, under both the American Convention and the ICCPR.

b. Right to a Fair Trial

The right to a fair trial is well established in international law, and is preserved in both the American Convention and the ICCPR. The Dominican Republic had an obligation to provide fair trials to the surviving victims of the Guayubin Massacre.

Article 8 of the American Convention guarantees the right to a fair trial, and also specifies minimum rights due during a criminal proceeding. The article states that:

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

¹¹⁰ ICCPR, *supra* note 10, art. 9.

¹¹¹ Human Rights Comm., General Comment No. 8: Right to Liberty and Security of Persons, ¶ 4 (June 30, 1982), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), at 179 (May 27, 2008).

In *Riebe Star et al. v. Mexico*, the Inter-American Commission interpreted Article 8(1) to include the right to administrative hearings, stating that the guarantees of that provision include

the right to be assisted during the . . . proceedings; to practice their right of defense, with enough time to ascertain the charges against them and hence to refute them; to have a reasonable time in which to prepare and formalize their statements; and to seek and adduce the corresponding evidence.¹¹²

Moreover, Article 25 of the American Convention provides the “right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate . . . fundamental rights recognized by the constitution or laws of the state concerned or by this Convention.”¹¹³ In interpreting this article, the Inter-American Court has repeatedly noted that “[u]nder the Convention, States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8(1)).”¹¹⁴ Inter-American law thus requires not only that these remedies exist, but also that they be both adequate and effective.

Furthermore, the Inter-American Court has acknowledged the use of military judgment in civilian matters is highly suspect. The Court has specifically found that the use of military tribunals to try such cases, due process rights and access to justice in general are infringed, stating that:

In effect, military tribunals are not the tribunals previously established by law for civilians. Having no military functions or duties, civilians cannot engage in behaviors that violate military duties. When a military court takes jurisdiction over a matter that regular courts should hear, the individual’s right to a hearing by a competent, independent and impartial tribunal previously established by law and, *a fortiori*, his right to due process are [sic] violated. That right to due process, in turn, is intimately linked to the very right of access to the courts.¹¹⁵

The Commission has specifically recommended that “member states adopt pursuant to Article 2 of the Convention, the internal measures necessary to limit the jurisdiction of military tribunals to only those crimes of a specific military nature. *All cases of human rights violations must therefore be submitted to the ordinary courts.*”¹¹⁶ Where soldiers commit violations of human rights while on duty, they must stand trial in civilian courts in addition to being held accountable before any relevant military tribunals.

¹¹² *Riebe Star et al v. Mexico*, Case 11.610, Inter-Am. Comm’n H.R., Report No. 49/99, OEA/Ser.L/V/II.95, doc. 7 rev. ¶ 71 (1999).

¹¹³ American Convention, *supra* note 3, art. 25.

¹¹⁴ *Vélasquez-Rodríguez v. Honduras*, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 1, ¶ 91 (Jun. 26, 1987).

¹¹⁵ *Petruzzi et al v. Peru*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 52, ¶ 128 (May 30, 1999).

¹¹⁶ Inter-American Commission on Human Rights, Annual Report of the Inter-American Commission on Human Rights 1993, OEA/Ser.L/V.85 Doc. 9 rev., Final Recommendations ¶ 4, Feb. 11, 1994 [emphasis added].

The right to a fair trial is also enshrined in Article 14 of the ICCPR, which guarantees “a fair and public hearing by a competent, independent and impartial tribunal established by law.” The article also provides minimum guarantees to be observed during criminal proceedings. In interpreting Article 14, The Human Rights Committee has noted that military trials of civil matters may be problematic due to the fact that “[q]uite often the reason for the establishment of such [military] courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice.”¹¹⁷

Importantly, the Human Rights Committee has also stated:

While the Covenant does not prohibit the trial of civilians in military or special courts, it requires that such trials are in full conformity with the requirements of article 14 and that its guarantees cannot be limited or modified because of the military or special character of the court concerned. The Committee also notes that the trial of civilians in military or special courts may raise serious problems as far as the equitable, impartial and independent administration of justice is concerned. Therefore, it is important to take all necessary measures to ensure that such trials take place under conditions which genuinely afford the full guarantees stipulated in article 14. Trials of civilians by military or special courts should be exceptional, i.e. limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials.¹¹⁸

Moreover, the Human Rights Committee has unambiguously stated that the rights delineated in the ICCPR are generally applicable to everyone “irrespective of reciprocity, and irrespective of his or her nationality or statelessness.”¹¹⁹ According to the Human Rights Committee, “the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens. Aliens receive the benefit of the general requirement of non-discrimination in respect of the rights guaranteed in the Covenant, as provided for in article 2 thereof.”¹²⁰

The Dominican military failed to provide the survivors of the massacre with access to civilian courts after detaining them. Moreover, the use of military tribunals to try the soldiers who participated in the massacre and abused the human rights of the victims may have constituted further breaches of these obligations.

¹¹⁷ Human Rights Comm., General Comment No. 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law, ¶ 4 (Apr. 13, 1984), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), at 184 (May 27, 2008) (citations omitted).

¹¹⁸ Human Rights Committee, General Comment No. 32: Art. 14: Right to Equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/G/GC/32 ¶ 22 (Aug. 23, 2007) (citations omitted).

¹¹⁹ Human Rights Comm., General Comment No. 15: The Positions of Aliens under the Covenant, ¶ 1 (Apr. 11, 1986), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I), at 189 (May 27, 2008).

¹²⁰ *Id.*, ¶ 2.

2. *The victims were treated as security threats rather than irregular border-crossers, an impermissible assumption under the American Convention and other applicable norms.*

Freedom of movement is guaranteed under Article 22 of the American Convention, which provides in pertinent part:

1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law.
2. Every person has the right to leave any country freely, including his own.
3. The exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.
4. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.

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6. An alien lawfully in the territory of a State Party to this Convention may be expelled from it only pursuant to a decision reached in accordance with law.
 7. Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes.
 8. In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.
 9. The collective expulsion of aliens is prohibited.¹²¹

The American Convention and the ICCPR—as discussed above—guarantee to migrants the same fundamental human rights as other individuals, regardless of their status within a particular State’s territory. The principles of equality and non-discrimination are fundamental, and are not to be derogated from in a State’s treatment of an individual solely because of their migratory status. The Inter-American Court has stated that “States must respect and ensure human rights in light of the general basic principle of equality and non-discrimination. Any discriminatory treatment with regard to the protection and exercise of human rights entails the international

¹²¹ American Convention, *supra* note 3, art. 22.

responsibility of the State.”¹²² Importantly, the Inter-American Court has held that an individual need not have a “regular situation” in a [S]tate in order for the [S]tate to provide equal and non-discriminatory treatment. As noted above, this is a fundamental principle and “all States must guarantee it to their citizens *and to all aliens who are in their territory*.”¹²³

This is not to say that States cannot act against migrants who violate national laws, or that migrants must be treated equally to citizens in all respects. The Court concedes, of course, that there are times when it may be necessary to prosecute aliens or to distinguish between aliens and nationals. Nonetheless, any measures taken “must always be applied with strict regard for the guarantees of due process and respect for human dignity.”¹²⁴

The American Convention does allow States to restrict freedom of movement in certain cases, such as when national security or public safety are at stake.¹²⁵ This does not, however, give States leeway to treat individuals as security threats based solely on their migratory status. Indeed, the United Nations Working Group on Arbitrary Detention has noted that “criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary detention.”¹²⁶ Further, the United Nations Special Rapporteur on the Human Rights of Migrants has found that the status of an individual as an illegal immigrant is insufficient on its own to justify punitive detention:

Infractions of immigration laws and regulations should not be considered criminal offences under national legislation. The Special Rapporteur would like to stress that irregular migrants are not criminals *per se* and they should not be treated as such. Detention of migrants on the ground of their irregular status should under no circumstance be of a punitive nature.¹²⁷

The jurisprudence of the Inter-American Court is consistent on this point, as the Court has stated:

[T]he detention of people for noncompliance with immigration laws should never involve punitive purposes. Hence, a custodial measure should only be applied when it is necessary and proportionate in the specific case to the purposes mentioned supra and only for the shortest period of time. Therefore, it is essential for States to seek alternatives to detention whenever possible, which may be effective for the achievement of the purposes described. As a consequence, those migratory policies whose central focus is the mandatory detention of irregular migrants, without ordering the competent authorities to verify in each particular

¹²² Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 96 (Sep. 17, 2003).

¹²³ *Id.*, ¶ 118 (emphasis added).

¹²⁴ *Id.*, ¶ 119.

¹²⁵ See American Convention, *supra* note 3, art. 27(1).

¹²⁶ Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, Report of the Working Group on Arbitrary Detention, ¶ 53, U.N. Doc. A/HRC/7/4 (Jan. 10, 2008).

¹²⁷ Special Rapporteur on the Rights of Migrants, *Specific Groups and Individuals: Migrant Workers*, ¶ 73, U.N. Doc E/CN.4/2003/85 (Dec. 30, 2002).

case and by means of an individualized evaluation, the possibility of using less restrictive measures of achieving the same ends, are arbitrary.¹²⁸

Moreover, Inter-American law holds that it is impermissible for migrants to be detained in the same facilities as individuals accused or convicted of crimes, even when detention is necessary and proportionate.¹²⁹ The Court has explained that illegal immigrants who are not also accused of other crimes must be detained in a separate location:

In cases of migrants, detention and imprisonment of persons solely for their irregular status should only be used as necessary and proportionately in the concrete case, only admissible for the shortest possible period of time and according to the legal purposes mentioned . . . States must provide public establishments specifically designed for that purpose, and if the State does not have such establishments, it must provide premises other than those intended for persons imprisoned under criminal law.¹³⁰

International law permits States to neither assume that aliens pose security threats nor to treat migrants as criminals based solely on their non-national status. The actions of the Dominican Republic in this case in this regard run contrary to the fundamental principles of equality and non-discrimination with respect to the victims and survivors of the Guayubin Massacre.

E. The actions of the Dominican Republic in this case are indicative of a broader human rights crisis related to border militarization in the Americas.

As described in the context section of this brief, the Dominican government has implemented massive expulsion and deportation operations systematically in the past ten years. Even when massive sweeps were not being carried out, the “ordinary” rate of expulsions and deportations during the past decade hovered around 24,000 to 30,000 per year, according to sources that include Dominican officials.¹³¹ Estimates by these officials and other observers show that expulsions and deportations continued to be carried out at a rate of some 2,000 per month during 2000,¹³² which increased significantly at the outset of 2001.¹³³ The policy and practice of mass

¹²⁸ *Velez Loor v. Panama*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 218, ¶ 171 (Nov. 23, 2010) (citations omitted).

¹²⁹ *Id.*, ¶ 208.

¹³⁰ *Id.*

¹³¹ Juan O. Tamayo, *Border Barriers: A Dominican crackdown on illegal immigration keeps desperate Haitians out, expels thousands already in*, MIAMI HERALD, Feb. 6, 2000; David Abel, *Haitians see hope across the border; Dominican Republic’s hardships still better than life in homeland*, HOUSTON CHRONICLE, Jan. 9, 2000 at A26. These articles are annexes to Petitioner’s pleading, Record of Oral Arguments and Supporting Documents, submitted to the Inter-American Commission on March 1, 2001, during the formal hearing with the Dominican government held on the merits of Case 12.271 [hereinafter “2001 Record and Documents”].

¹³² See *Plus de 3000 haitiens déportés de la République Dominicaine vers Haiti pendant ces deux dernières semaines*, Sep. 1, 2000, <http://www.infohaiti.com/ifo0060.html>, at Annex 28 [hereinafter *Plus de 3,000 haitiens déportés*]. See also J. Jesús Aznarez, *Soldados Dominicanos Maltratan y Deportan a Votantes de Origen Haitiano*, EL PAÍS, May 15, 2000; *Dominican Government Admits Confiscation of Blacks’ Voting Cards*, EFE, May 15, 2000, available as an annex to the 2001 Record and Documents, *supra* note 131.

expulsions have victimized Dominicans of Haitian descent and Haitian workers in the Dominican Republic.¹³⁴

A 1997 report of the Inter-American Commission describes how Dominican officials rounded up victims and detained them with no opportunity to contact their families or their employers.¹³⁵ Victims of mass expulsions were denied a hearing or any other opportunity to prove their legal status or establish the length of their residency in the Dominican Republic.¹³⁶ Dominican documentation, when presented, was often confiscated or destroyed by officials.¹³⁷ Finally, they were summarily shipped to the border on trucks or buses and collectively dumped on the Haitian side of the border.¹³⁸

1. *Human rights abuses along the Dominican Republic-Haiti border, of which the Guayubin Massacre is an example, are directly related to the militarization of that border.*

In 1999, a petition was filed on behalf of a group of Haitians and Dominicans of Haitian origin before the Inter-American Commission to challenge Dominican policy of mass expulsions involving serious human rights violations.¹³⁹ The Petitioners also sought and were granted provisional measures by this Court; these measures were repeatedly renewed, including, most recently, on February 29, 2012. Petitioners in the *Benito Tide Mendez v. Dominican Republic* petition have submitted evidence that deportations and expulsions of individuals of Haitian origin occur in the Dominican Republic “with no prior warning and involve the use of excessive force, including different types of physical intimidation”¹⁴⁰ and that there is “no opportunity to prove their legal status or make arrangements prior to being expelled”.¹⁴¹ The petition claims that the deportees “are deprived of their ability to contest the deportation, contact family members, or obtain legal assistance.”¹⁴² The Inter-American Commission declared the petition admissible in

¹³³ See, e.g., *Près de 4.000 haïtiens rapatriés en deux semaines de la République Dominicaine*, Jan. 25, 2001, www.infohaiti.com, [hereinafter *Près de 4.000 haïtiens rapatriés*], available as an annex to the 2001 Record and Documents, *supra* note 131; Fior Gil, *Autoridades Migración Repatrian Haitianos Ilegales Con Enfasis en Pediguenos*, HOY, Jan. 25, 2001, (stating that the Migration Office has stepped up its “repatriation” of undocumented Haitians), at Annex 30 [hereinafter *Autoridades Migración*].

¹³⁴ See, e.g., Petitioners’ March 28, 2000 Spanish version of the Report on the Situation of Haitians and Dominicans, and Reply to the Dominican Government Response to the Commission (Informe sobre la situación de los Haitianos y los Dominico-Haitianos en República Dominicana, y comentario a la respuesta del gobierno dominicano ante la Comisión Inter-Americana) at 2-5 [hereinafter “March 2000 Pleading”]. Conservative estimates place the number of Dominicans of Haitian descent and Haitian workers residing in the Dominican Republic at approximately 700,000, or almost 12% of the of 8 million people in the Dominican Republic. Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in the Dominican Republic*, OEA/Ser.L/V/II.104, Doc. 49 rev. 1, ¶ 350 (1999) [hereinafter *1999 IACHR Report*].

¹³⁵ Inter-American Commission of Human Rights, *Report on the Situation of Haitians in the Dominican Republic*, 1991 Annual Report to the OAS General Assembly, Feb. 1992 [hereinafter *1991 IACHR Report*].

¹³⁶ *Id.* ¶ 326.

¹³⁷ *Id.* ¶ 328.

¹³⁸ See *id.*

¹³⁹ *Benito Tide Mendez et al v. Dominican Republic*, Petition 12.271, Inter-Am. Comm’n H.R., Report No. 68/05, OEA/Ser.L/V/II.124 Doc. 5 ¶ 1 (2005).

¹⁴⁰ *Id.*, ¶ 21.

¹⁴¹ *Id.*, ¶ 22.

¹⁴² *Id.*

2005, and acknowledged that the allegations therein could constitute a violation of human rights enshrined in the American Convention if proven true.¹⁴³ The petition remains pending following its admissibility and the issuance of provisional measures.

The use of excessive armed force to shoot, detain and expel Haitian migrants in this case at the Dominican Republic-Haiti border is an example of a broader phenomenon involving the deterioration of human rights due to border militarization in the Americas. In 2006, the Dominican Republic created a new military unit, the Cuerpo Especializado de Seguridad Fronteriza Terrestre (CESFRONT), charged with securing the border between the Dominican Republic and Haiti.¹⁴⁴ CESFRONT initially comprised some 500 troops stationed in the Dominican Republic's four provincial capitals located along the border with Haiti, but this number has since increased and reports indicate a planned eventual force size of 2,000 soldiers.¹⁴⁵

Since its inception in late 2006, there have been multiple reports of CESFRONT involvement in violence against civilians. In March 2008, there were two instances of individuals being shot and killed at the Haitian border by CESFRONT officials.¹⁴⁶ In April 2008, CESFRONT soldiers shot a Haitian citizen upon his refusal to be searched when he attempted to cross the border to purchase ice.¹⁴⁷ In August 2008, a CESFRONT soldier shot and killed an individual who refused to pay a bribe in order to cross the border.¹⁴⁸ In November 2008, a Haitian teenager was shot and killed by a CESFRONT soldier as he was crossing the border.¹⁴⁹

¹⁴³ *Id.*, ¶ 48, 41.

¹⁴⁴ President of the Republic, Decreto No. 325-06, Que crea el Cuerpo Especializado de Seguridad Fronteriza Terrestre (CESFRONT), dependiente de la Secretaria de Estado de las Fuerzas Armadas, Aug. 8, 2006, http://www.presidencia.gob.do/app/pre_decretos_det.aspx?id=6340&e=8%2f8%2f2006.

¹⁴⁵ Ejército Nacional, "CESFRONT" Inician operaciones vigilancia en la zona fronteriza del país, Sep. 28, 2007, http://www.ejercito.mil.do/index.php?option=com_content&task=view&id=116&Itemid=51; CESFRONT aumentará agentas de la frontera, DIARIOLIBRE.COM, Jun. 7, 2008, http://www.diariolibre.com/noticias_print.php?id=19366&s.

¹⁴⁶ For the first incident, see Solidaridad Fronteriza, *SFw denuncia que la agresividad del Cesfront se intensifica*, <http://www.sjmdom.org.do/spip/spip.php?article605> (last visited Mar. 19, 2012); Press Release, Group d'Appui aux Rapatriés et Réfugiés, Otro haitiano herido por las balas del CESFRONT (April 1, 2008), <http://www.garr-haiti.org/spip.php?breve99>. For a slightly different version of the same incident, see *Militar del Cesfront mata a una haitiana*, DIARIOLIBRE.COM, March 26, 2008, http://www.diariolibre.com/noticias/2008/03/26/i10026_index.html. This article describes "Joazard Anette" as a companion of Jean Simon, saying that both were fired on by Sergeant Amaury Polanco Ramón of CESFRONT when trying to cross the border to transport fuel. The misspelling of Haitian names, and the use of several different versions of a person's name, is common in the Dominican Republic. For the second incident, see *Supuesto traficante haitiano muere por disparos de fuerzas antidroga en Dajabón*, El Nuevo Diario (Mar. 28, 2008), <http://www.elnuevodiario.com.do/app/article.aspx?id=96425>; Press Release, Group d'Appui aux Rapatriés et Réfugiés, Otro haitiano herido por las balas del CESFRONT (April 1, 2008), <http://www.garr-haiti.org/spip.php?breve99>.

¹⁴⁷ Press Release, Group d'Appui aux Rapatriés et Réfugiés, Otro haitiano herido por las balas del CESFRONT (April 1, 2008), <http://www.garr-haiti.org/spip.php?breve99>.

¹⁴⁸ Eddy Beltre, *Militar del CESFRONT balea trabajador haitiano por RD\$20 pesos en frontera norte*, ESPACINSULAR.ORG (August 10, 2008), <http://www.espacinsular.org/spip.php?article6153>.

¹⁴⁹ Ricardo Santana & Willian Estévez, *Soldado dominicano mata a un inmigrante haitiano en la frontera*, LISTINDIARIO.COM (Nov. 6, 2008) <http://www.listindiario.com/app/article.aspx?id=80081>; *Dominican Republic soldier accused of killing Haitian*, MIAMI HERALD, Nov. 6, 2008, <http://www.miamiherald.com/news/americas/haiti/story/758608.html>.

Since the deployment of CESFRONT in the Dominican Republic, there have been increasing reports of corruption and arbitrary arrests.¹⁵⁰ Press reports have claimed that CESFRONT has engaged in mass expulsions of Haitians from the Dominican Republic without due process. Credible reports conclude that the Dominican Republic summarily expels up to 20,000 Haitians per year without any due process.¹⁵¹

The Inter-American Commission and other human rights organizations have criticized the use of military forces in routine border enforcement. The militarization of the border between the Dominican Republic and Haiti has occurred in concert with documented human rights abuses along the border committed by forces intended to provide security. It is this very phenomenon on the Haitian-Dominican border that has played out to the detriment of the victims in this case. However, the broader phenomenon of border militarization has been connected directly to the deterioration of human rights of regular and irregular migrants on other borders in the Americas.

2. *The Inter-American Commission and other human rights organizations have noted the adverse human rights impact of militarization of border enforcement on the United States-Mexico and the Colombia-Ecuador borders.*

The Inter-American Commission has noted with concern the increasing militarization of the border between the United States and Mexico. In the late 1990s and early 2000s, United States policy was to strengthen controls at the border with Mexico, vastly increasing the size of the border force and heavily investing in the infrastructure available to border patrol agents.¹⁵² The Commission noted that border security was tightened even further in the wake of the September 11, 2001 terrorist attacks.¹⁵³ The Inter-American Commission has also noted that the U.S. Customs and Border Protection's (CBP) \$10.2 billion budget for 2008 reflects a 31.4% increase over 2007 and that the CBP is the largest arms-bearing branch of the U.S. government, excluding the military.¹⁵⁴ The Commission found with respect to the United States-Mexico border that increased border militarization directly resulted in increasing deaths of migrants. The Commission's 2003 Annual Report stated that:

¹⁵⁰ See, e.g. Edwin Ruiz, *Dajabón: mercado con Haití crece sin orden, ni normas*, CLAVE DIGITAL, Mar., 22, 2009, http://www.clavedigital.com/app_pages/Portada/Titulares.aspx?id_Articulo=17454; *Sargento del CESFRONT de golpiza a dos haitianos*, El Nuevo Diario (Feb. 17, 2009), <http://www.elnuevodiario.com.do/app/article.aspx?id=140381>.

¹⁵¹ Diógenes Tejada, *Repatrian más de 20 mil haitianos en un año*, EL VIAJERO DIGITAL, Nov. 9, 2008, http://www.elviajero.com.do/?module=displaystory&story_id=6337&format=html.

¹⁵² Since 1994, the U.S. government has spent an estimated \$35 billion to "secure" the U.S.-Mexico border. From 1993 to 2008 the number of Border Patrol agents expanded from approximately 4,000 to 18,049 and the amount of spending on border enforcement has increased tenfold from \$1 to \$10.2 billion per year. BORDER NETWORK FOR HUMAN RIGHTS, BEHIND EVERY ABUSE IS A COMMUNITY: U.S./MEXICO BORDER REPORT TO THE UNITED NATIONS HUMAN RIGHTS COMMITTEE REGARDING THE UNITED STATES' COMPLIANCE WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 6 (2006), <http://www.bnhr.org/wp-content/uploads/2010/01/BNHR-UN-Report3.pdf> [hereinafter U.S./MEXICO BORDER REPORT].

¹⁵³ Inter-American Commission on Human Rights, Annual Report of the Inter-American Commission on Human Rights 2003, ¶ 173, OEA/Ser.L/V/II.118 Doc. 5 rev. 2 (Dec 29, 2003) (hereinafter Inter-American Commission 2003 Report).

¹⁵⁴ *Id.*

From 1993 to 1997, the number of deaths of persons trying to cross the border in such circumstances tripled. According to official figures, from 1994 to 2002, 2,200 people died trying to cross the border into the United States. As of June 15, 2003, 89 persons had died. According to a spokesperson for the Border Patrol, in recent years that agency has rescued some 4,200 persons who were in serious danger of losing their lives.¹⁵⁵

In its 2003 Report, the Commission noted that as a direct result of border militarization on the United States-Mexico border, migrants are exposed to ever-greater danger to their lives.¹⁵⁶ Similarly, in a 2010 report on immigration in the United States, the Commission noted its concerns:

One of the most harmful effects of the physical barriers erected along the border is that their deterrent effect is temporary, as they merely steer immigrants in the direction of those border areas where no physical barriers have been erected and where conditions tend to be so extreme as to make the crossing highly dangerous. Summing up, this type of measure increases the death rate among undocumented migrants, as various organizations have confirmed. More serious still are the reports of immigrants killed as they attempted to cross the border by immigration agents who resorted to an excessive and disproportionate use of force.¹⁵⁷

The increasing allocation of resources to border security in the United States has been accompanied by an acute rise in the number of detained and expelled aliens. The Commission noted a disturbing increase in the detention of aliens seeking entry.¹⁵⁸ The Commission found that:

[T]he United States resorts to immigration detention with increasing frequency, even though in many cases the detention is neither necessary nor appropriate under international norms on the right to personal liberty. In effect, [Immigration and Customs Enforcement] detention of noncitizens has almost doubled in the last ten years, from some 209,000 in [fiscal year] 2001, to 378,582 in [fiscal year] 2008.¹⁵⁹

In many cases, aliens crossing the border are subject to summary removal with limited recourse to civil or judicial review.¹⁶⁰ Since the Commission's report, there has been a

¹⁵⁵ Inter-American Commission 2003 Report, *supra* note 153, ¶ 174.

¹⁵⁶ *Id.*, ¶ 174-75.

¹⁵⁷ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, REPORT ON IMMIGRATION IN THE UNITED STATES: DETENTION AND DUE PROCESS ¶ 107 (2010).

¹⁵⁸ Non-citizens whose admissibility to the United States cannot be determined or confirmed by border officials are designated as "arriving aliens." Ostensibly, arriving aliens are entitled to judicial review of their cases, but in practice these non-citizens are detained until such time as their claim is adjudicated in immigration court. *Id.*, ¶ 119; Immigration and Nationality Act, 8 U.S.C. § 1225(b)(2) (2006).

¹⁵⁹ *Id.*, ¶ 101.

¹⁶⁰ Under expedited removal immigration officers have the authority to exclude aliens if they arrive without proper documentation or attempt to enter through fraud or misrepresentation, unless the aliens indicate that they wish to apply for asylum or fear persecution or torture in their country of origin. Expedited removal is not subject to administrative appeal, and allows for very little administrative or judicial review for excluded or removed aliens.

dramatic increase in detentions¹⁶¹ and summary removals,¹⁶² a policy that combines heavy militarized border enforcement with a cycle of arrest-detention-removal of aliens and migrants without adequate rights protections. The increase in detentions and expulsions of aliens suggests a disregard for the human rights of migrants, as noted by the Commission, directly related to the increased militarization of borders.

The observations of the Inter-American Commission regarding militarization of the United States-Mexico border are echoed in reports from other organizations on the situation on the Colombia-Ecuador border. Both Colombia and Ecuador have increased State military presence along the border between them. The International Crisis Group has noted that the longstanding armed conflict in Colombia has resulted in increasing militarization of the Colombian borders since the 1990s.¹⁶³

The militarization of the Colombia-Ecuador border has been accompanied by increasing human rights abuses, including violence against civilians. In its report to the Human Rights Council for the 2011 Universal Periodic Review of Ecuador, the Committee against Torture made specific note of the violence occurring at the border, citing its deep concern about reports of violence against civilians:

The Committee notes with great concern the deterioration in the situation on the northern border with Colombia stemming from the domestic conflict in that neighbouring country and the presence of groups involved in organized crime, as a result of which the State party has stepped up its military presence in the area. While it appreciates the serious difficulties the State party has to deal with in order to preserve public order in provinces on the border, the Committee is deeply concerned about the reports received of continual abuses and acts of violence against the civilian population, and in particular asylum-seekers and refugees of Colombian nationality, committed by illegal armed groups and members of the Ecuadorian and Colombian security forces.¹⁶⁴

The increased militarization of the borders between the United States and Mexico, and Colombia and Ecuador has been accompanied by the corrosion of human rights for civilians in a similar manner in which these phenomena have been linked in this case in the Haiti-Dominican border. The facts in this case illustrate the devastating effects of the escalation of violence caused by

See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub L. No 104-208, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C.) [hereinafter IIRIRA]. For an overview of the expedited removal policy, see ALISON SISKIN & RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL33109, IMMIGRATION POLICY ON EXPEDITED REMOVAL OF ALIENS (2005).

¹⁶¹ In 2010, Immigrations and Customs Enforcement (ICE) detained approximately 363,000 foreign nationals compared to 231,500 in 2003. DEPARTMENT OF HOMELAND SECURITY OFFICE OF IMMIGRATION STATISTICS, ANNUAL REPORT JUNE 2011: IMMIGRATION ENFORCEMENT ACTIONS: 2010 1 (2011) [hereinafter DHS 2010 REPORT]. *Compare* DEPARTMENT OF HOMELAND SECURITY OFFICE OF IMMIGRATION STATISTICS, 2003 YEARBOOK OF IMMIGRATION STATISTICS 148 (2004) [hereinafter DHS 2003 YEARBOOK].

¹⁶² In 2010 ICE removed 387,000 aliens from the United States, with 111,000 of these due to expedited removal. DHS 2010 REPORT, *supra* note 161, at 1. These statistics show a dramatic increase from 2003, when 186,151 aliens were removed, with 43,248 due to expedited removal. DHS 2003 YEARBOOK, *supra* note 161, at 149.

¹⁶³ INTERNATIONAL CRISIS GROUP, MOVING BEYOND EASY WINS: COLOMBIA'S BORDERS 1, 2 (2011).

¹⁶⁴ Report of the Committee Against Torture, ¶ 14, U.N. Doc. CAT/C/ECU/4-6 (Nov. 19, 2011)

militarization in the context of longstanding discrimination and violence against people of Haitian descent in the Dominican Republic. Armed forces commit human rights abuses against regular and irregular migrants, including refugees, along the border. Moreover, military justice may be substituted for civil justice even in cases where violations of human rights occur, in contravention of international law. The distressing trend of border militarization and the associated decline in human rights in the Americas needs to be reversed in order to prevent tragic events such as those occurring in this case.

IV. CONCLUSION

The events that took place on and after June 18, 2000 at the hands of Dominican State agents resulted in tragic loss of life of seven Haitian migrants, and serious physical and psychological harm to another thirty surviving victims. The treatment of these individuals from the beginning to end of their ordeal was unacceptable: though they were unarmed civilians, including women and children, they were repeatedly shot, the dead were left for hours and then buried anonymously in a mass grave. The survivors were given no right to judicial or administrative process whatsoever, despite that among them may have been refugees or others with claims to protected rights under international law. The surviving victims were subjected to arbitrary detention, inhumane treatment, and then forced to choose between indefinite detention or bribing their way to summary expulsion. The victims' attempts to seek redress through judicial process were thwarted by the Dominican government's treatment of the inquiry as a military rather than civilian matter.

The Dominican Republic's actions in these events suggest violations of fundamental human rights under its treaty and customary obligations. The fundamental nature of these rights allows for no exception for persons who may be in undocumented status or crossed the border without authorization—they apply to all persons, without discrimination, found on the State's territory. Most disturbing in this case is the abrogation by the civil authorities in the Dominican Republic of their duty to carry out their obligations to investigate the status of border-crossers, to conduct determinations of identity and status, to provide refugee status determinations and treat those so recognized as asylum-seekers, and to conduct administrative or judicial inquiry into claims of right when detaining individuals. Converting civil matters involving border issues into military procedures illustrates the growing phenomenon in the Americas of border militarization. This case is a tragic example of the deterioration of human rights norms that follows inexorably from such border militarization. The Haitian victims here were treated as security threats, not human persons. Amici urge that this Court not countenance the existence of any area in the territory of OAS party States where individuals are denied the 'right to access rights.'

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