001253

Before the

INTER-AMERICAN COURT OF HUMAN RIGHTS

Dilcia Yean, Violeta Bosico,
Original Claimants,

v.

Dominican Republic
Respondent.

Case No. 12.189

POST-TRIAL BRIEF CONCERNING REQUESTS, ARGUMENTS, AND EVIDENCE

April 14, 2005

Submitted on Behalf of the Original Claimants by

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001254

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY OF ARGUMENT

Dilcia Yean and Violeta Bosico ("Victims"), a girl and a young woman of Haitian ancestry born in the Dominican Republic, come before the Inter-American Court of Human Rights ("Court") because the Dominican Republic has violated their fundamental rights guaranteed by the American Convention on Human Rights ("Convention"). The Dominican Republic ("State") denied Dilcia and Violeta their birth certificates for reasons that were discriminatory, arbitrary and illegal, and in contravention of the Dominican constitution and the Convention. By virtue of their inability to prove their nationality and their legal identity, the State ejected Dilcia and Violeta from the charmed circle of full legal and cultural citizenship. Presumed Haitian and therefore illegal, the State continues to expose the girls to the risk of summary expulsion from their country. Further, Violeta was expelled from elementary school solely because she did not possess the birth certificate that the State illegally denied her, and both Dilcia and Violeta continue to face uncertain access to education and nationality. Thus, the Dominican Republic has violated the Victims' rights to protection of childhood, nondiscrimination, education, nationality, juridical personality, due process and judicial protection, name, and family. The Dominican Republic also stands in breach of its Article 1 and 2 duties to respect and guarantee Convention rights, and to adopt internal measures to conform its legal regime to the Convention.

This case affords the Court the opportunity to strengthen the rights of the child under the Convention. Because of their vulnerability and their potential for growth and development, the Convention grants children special protection under Article 19. Recently, the Court has articulated the contours of that protection, reasoning that Article 19 must be read as infusing the Convention as a whole with a heightened standard of protection for children.[1] We argue that the Court should interpret all claims arising under this case through Article 19, placing emphasis on the special needs – and rights – of one of Latin America's most vulnerable groups.[2] The Court should be guided in its interpretation of each right by the principle of the best interests of the child. In sum, the Court should consider the scope of Dilcia's and Violeta's rights not as they apply to persons in the abstract, but as it applies to the Victims as children.

By thus bolstering the Convention's protections, the Court can vindicate the rights of the Victims and put an end to the use of birth registration as a State instrument for excluding minority children from full participation in social life. As Judge Cançado Trindade observed: "a world which does not take care of its children, which destroys the enchantment of their infancy within them, which puts a premature end to their childhood, and which subjects them to all sorts of deprivations and humiliations, effectively has no future."[3]

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[1] *Instituto de Reeducación del Menor v. Paraguay*, Judgment of September 2, 2004, Inter-Am. Ct. H.R. (Ser. C) [hereinafter *Instituto de Reeducación*]; *Hermanos Gómez Paquiyauri vs. Perú*, Judgment of July 8, 2004, Inter-Am. Ct. H.R. (Ser. C) [hereinafter *Gómez Paquiyauri*]; *Bulacio v. Argentina Case*, Judgment of September 18, 2003, Inter-Am. Ct. H.R. (Ser. C) [hereinafter *Bulacio*]; Advisory Opinion, OC-17/02 of August 28, 2002, *Legal Status and Human Rights of the Child* Inter-Am. Ct. H.R. (Ser. A) No.17 [hereinafter *Legal Status*]; *Villagrán Morales Case ("Street Children Case")*, Judgment of November 19, 1999, Inter-Am. Ct. H.R. (Ser. C) [hereinafter *Street Children Case*].

[2] *Legal Status*, *supra* note 1, at ¶ 56

[3] *Id.* at ¶ 2 (Judge A.A. Cançado Trindade concurring).

The law and facts presented in this case overwhelmingly demonstrate that the Victims have succeeded on every one of their claims and the Court should order the State to reform its domestic laws and to compensate the Victims and their families for the harm it has inflicted on them. The Court should find for the Victims because:

1. The case is properly before the Court. The Court should reject the State's contentions regarding preliminary exceptions. First, the State's claim that Dilcia and Violeta were registered in fulfillment of a friendly settlement agreement is groundless and contradicts the procedural history of this case as well as the State's pleadings before the Commission. Second, the Court should preclude the State from arguing that local remedies have not been exhausted given the Commission's well-reasoned decision on the matter. Finally, the record clearly demonstrates that the Victims exhausted the remedies available in accordance with applicable Dominican law, that the State did not introduce the exhaustion exception in a timely manner, and failed to prove the effectiveness of internal remedies in accordance with the Court's jurisprudence.

2. The State has violated its duties to Dilcia and Violeta as children through its discriminatory denial of their birth certificates. Article 19 of the Convention mandates the Court interpret the substantive human rights guarantees to the Victims *as children* through a heightened standard. The Dominican Republic failed to uphold its anti-discrimination duties to children by intentionally withholding birth registration from Dilcia and Violeta because of their Haitian ancestry. The birth registration requirements imposed by the State in this case adversely impact Dominican-born children of Haitian descent whose parents frequently do not have documented legal status. The requirements also facilitate arbitrary discrimination against children of Haitian descent by requiring proof of the legal status of the parent. The State left the girls in a condition of *de facto* statelessness by denying their birth registration applications in violation of the Dominican constitution and the Convention. Dilcia and Violeta have been denied the right to education; Violeta was expelled from school which denied her right to an education that is acceptable, and the State violated both girls' rights to an education that is accessible by conditioning school enrollment on a birth certificate – a document the State refused to issue.

3. Recent developments in Dominican law and practice fail to prevent repetition of the harm Dilcia and Violeta suffered and therefore the State must reform its internal laws. The State issued the Victims' birth certificates in contravention of domestic law. The State must reform its domestic laws to eliminate the discriminatory birth registration requirements, *in particular proof of legal status of either parent of the child.* The new birth regulations issued by the Junta Central Electoral ("JCE") maintain illegal requirements, the newly enacted Migration Law contains provisions that strip children born to Haitian workers of their right to nationality, and the State continues to expel children from school who do not have a birth certificate. Consequently, the Court must order the State to adopt laws and practices that eliminate *de facto* and *de jure* discrimination against Dilcia and Violeta and to ensure that the State cease its ongoing discrimination against the vulnerable group of children of Haitian descent.

STATEMENT OF MATERIAL FACTS IN DISPUTE

There are four material facts the State disputed in its petition and at trial. First, the State disputes that the case is properly before the Court, and alleges that the parties resolved this matter through friendly settlement.[4] Second, the State disputes that Thelma Bienvenida Reyes, the civil registrar to whom the girls applied for birth certificates, denied the Victims their birth certificates (*Actas)* on discriminatory grounds, and asserts that she denied their *Actas* because the Victims' mothers did not present their *cédulas*.[5] Third, the State denied at trial that it applied eleven requirements for birth registration, and instead alleges that, at most, it applied four requirements to the Victims.[6] Fourth, the State disputes that Violeta was forced to attend night school for lack of birth registration, and instead alleges that she voluntarily attended night school.[7] None of these allegations withstand scrutiny.

I. THIS CASE HAS NOT BEEN RESOLVED BY A FRIENDLY SETTLEMENT.

At trial, the State argued that a friendly settlement had already been reached, and this case was moot.[8] Though the Commission clarified that this was not the case, we provide additional facts regarding the continuing dispute among the parties.

The State argues that by issuing *Actas* to Dilcia and Violeta in 2001, it fulfilled the terms of a friendly settlement.[9] It was, and is, clear to all parties, that issuing the *Actas* did not complete a friendly settlement. Dilcia and Violeta included in their settlement proposal a panoply of measures, including compensation for the Victims, public recognition of the violations incurred, and modifications to internal regulations for late registration.[10] The State rejected the offer and consequently the parties failed to reach a settlement. The State's pleadings demonstrate the State knew the case remained in controversy. In a 2002 pleading before the Commission, the State reports:

> "En la audiencia [frente la CIDH del 15 de noviembre de 2001] no se llegó a ningún acuerdo entre las partes pues los peticionarios insistieron en que el caso no concluye con la entrega de las actas de nacimiento a las menores, si no que es necesario que el Gobierno cumpla con otras demandas...."[11]

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[4] *See* Argument of the State before Court, Regarding Preliminary Exceptions, 14 March 2005 [hereinafter "State Preliminary Exceptions Argument"].
[5] *See* Testimony of Thelma Bienvenida Reyes before Court, 14 March 2005 [hereinafter "Bienvenida Testimony"]; *see also* State's Response to the Demand in the Case of the Girls Yean and Bosico, Case 12.189, presented to the Court 13 November 2003, ¶¶ 12, 206 [hereinafter State's Response].
[6] *See* Bienvenida Testimony, *supra* note 5.
[7] *See* Testimony of Amada Rodriguez before Court, 14 March 2005 [hereinafter "Rodriguez Testimony"].
[8] *See* State Preliminary Exceptions Argument, *supra* note 4.
[9] *Id.*
[10] *See* Escrito presentado por los peticionarios, el 1° de marzo de 2000, como propuesta de solución amistosa para ser discutida durante la audiencia del 6 de marzo de 2000 ante la CIDH, Commission's Petition in the Case of the Girls Dilcia and Yean, Case 12.189, presented to the Court 11 July 2003 [hereinafter Commission's Petition], Anexo 5.
[11] Respuesta del Gobierno de la Republica Dominicana al Documento "Memorandum de Apoyo a la Audiencia Sobre Meritos" Presentado por los Peticionarios del Caso 12.189. Republica Dominicana. Dilcia Yean y Violeta

The State thus knew that it had failed to agree to a settlement of this matter.

II. THE VICTIMS' MOTHERS PRESENTED THEIR CÉDULAS AT THE TIME OF REGISTRATION AND THE CIVIL REGISTRAR DENIED THE VICTIMS BIRTH REGISTRATION BECAUSE OF THEIR HAITIAN DESCENT.

The State civil registrar, Ms. Bienvenida, claimed that she denied Dilcia's and Violeta's registrations because their mothers did not present their *cédulas*.[12] Substantial evidence in the record shows that this is simply untrue. In 1997, Dilcia's and Violeta's mothers, Leonidas Yean and Tiramen Bosico, each had a *cédula*,[13] which were presented to Ms. Bienvenida. Copies of their *cédulas* were presented to the Commission in October, 1998 and subsequently forwarded to the State.[14] The declaration and testimony of Mr. Genaro Rincón, and the declaration of Ms. Yean, are consistent on the fact that the mothers' *cédulas* were presented to Ms. Bienvenida.[15] The evidence demonstrates that these families were committed to registering their daughters, and spent considerable monetary resources and time to do so.[16] Given the proof that the Victims' mothers possessed *cédulas* and wanted to register their daughters, there is no logical reason to suggest that Ms. Bienvenidas' testimony on this point is credible.

There is only one explanation for Ms. Bienvenidas' denial of Dilcia's and Violeta's applications – as Mr. Rincón testified and the declarations assert – Ms. Bienvenidas denied their rightful applications because they were of Haitian descent, because they had "apellidos raros," and because she was under orders not to register anyone of Haitian descent. Professor Martinez' affidavit supports the truth of this explanation. He attests: "encuentro que el testimonio del Licenciado Genaro Rincón (Declaración del 9 de agosto de 1999) es altamente fiable," and notes that, "el principal obstáculo para registrar a sus hijos nacidos en la República dominicana es el rechazo de las autoridades civiles o la expectativa de que les denegarían el registro si lo solicitaran."[17]

Bosica, en Ocasión de la Audiencia Celebrada el 15 de Noviembre de 2001 (29 de Enero de 2002), Commission's Petition, *supra* note 10, Anexo 12(1), at 5 [hereinafter Respuesta del Gobierno 29 de Enero de 2002].

[12] *See* Bienvenida Testimony, *supra* note 5; *see also* State's Response, *supra* note 5, ¶¶ 12, 206.

[13] *See* Cédula de Identidad y Electoral de Tiramen Bosico, Commission's Petition, *supra* note 10, Anexo 3(C); Cédula de Identidad y Electoral de Leonidas Oliven Yean, Commission's Petition, *supra* note 10, Anexo 3(F8).

[14] *See* Petición Original sometida el 28 de octubre 1998 por parte del Movimiento de Mujeres Dominico-Haitiana, Anexos 4, 8, Commission's Petition, *supra* note 10, Anexo F.

[15] *See* Declaration of Genaro Rincón, Victims' Petition in the Case of the Girls Dilcia and Yean, Case 12.189, presented to the Court 12 October 2003 [hereinafter Victims' Petition], Anexo 2, page 6 [hereinafter Rincón Decl.]; Declaration of Leonidas Oliven Yean, Victims' Petition, Anexo 34, ¶ 3 [hereinafter Leonidas Decl.].

[16] *See* Declaration of Tiramen Bosico Cofi, Victims' Petition, *supra* note 15, Anexo 4 [hereinafter Tiramen Decl.]; Leonidas Decl., *supra* note 15.

[17] Declaración pericial del doctor Samuel Martínez, en apoyo a la CIDH y los Peticionarios Originales en Yean y Bosico v. República Dominicana, Caso No. 12.189, 14 February 2005, ¶ 14 [hereinafter Martinez Affidavit].

III. AFTER ITS INITIAL REJECTION, THE STATE CONTINUED DENYING THE VICTIMS' REGISTRATION BY APPLYING ELEVEN DISCRIMINATORY REQUIREMENTS.

The State justified Ms. Bienvendias' discriminatory denial of the applications by asserting that the Victims did not comply with a list of eleven requirements. At trial, the State surprisingly disclaimed the relevance of those eleven requirements; Ms. Bienvenidas repeatedly asserted the existence of, at most, four requirements for the late registration of birth,[18] and when questioned directly about the eleven requirements, she avoided acknowledging them. Her testimony was both internally inconsistent,[19] and inconsistent with substantial and irrefutable evidence that eleven requirements were applied to the Victims in this case.

In the 1998 decision of the Procurador Fiscal, he cites a list of requirements the Victims should have fulfilled.[20] The letter from the JCE,[21] submitted to the Commission twice by the State,[22] explicitly acknowledges and affirms the decision of the *Procurador Fiscal* containing twelve requirements, and annexes an official list of eleven requirements published by the JCE.[23] The head of the JCE, Dr. Manuel Ramon Morel Cerda, asserted that there are eleven requirements for late birth registration; no more, and no less.[24] Additionally, in their written pleadings before the Commission, the State made absolutely clear that the eleven requirements applied in the case of Dilcia and Violeta:

> desde que se inició el proceso, lo único que han exigido las autoridades domincanas a las demandantes para proceder al registro de las niñas es el cumplimiento de los requisitos que ordena la ley al momento de hacer una declaración tardía de nacimiento. Los requisitos establecidos por la Junta Central Electoral para la declaración tardía son los siquientes: [la lista de los once

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[18] When asked, on direct, about the requirements for Declaraciones Tardías, Ms. Bienvenida asserted that there were only four: (1) Certificado de nacimiento; (2) Cédula de Identidad y Electoral; (3) Certificado de Escolaridad; y (4) Certifado de Bautizado o no. She repeated this list when questioned on cross examination. Bienvendia Testimony, *supra* note 5.

[19] When questioned by representatives of the Victims, Ms. Bienvendia stated there were only two requirements for registration of individuals older than thirteen, and that she had absolutely no discretion in applying the requirements. *Id.* On questioning from the Court, Ms. Bienvenida asserted that not all of the four requirements were truly necessary to register, and that she had "bastante discresionalidad" to invent new requirements for late registration. *Id.*

[20] The list of eleven requirements issued by the JCE plus an additional requirement of an "Acto de notoriedad con siete testigos." Orden del Procurador Fiscal, de fecha 20 de Julio de 1998, Victims' Petition, *supra* note 15, Anexo3 [hereinafter Procurador Orden].

[21] Victims' Petition, *supra* note 15, Anexo 47.

[22] *See* Carta de la Secretaría de Estado de Relaciones Exteriores, Eduardo LaTorre, DEI-99-1225, al CIDH, 22 de noviembre de 1999 [hereinafter Carta de noviembre 22]; Carta de la Secretaría de Estado de Relaciones Exteriores, Rosario Graciano de los Santos, DEI-867-99, al CIDH, 27 de septiembre de 1999 [hereinafter Carta de 27 de septiembre].

[23] Victims' Petition, *supra* note 15, Anexo 46.

[24] Dr. Cerda is asked "I've received on list of eleven or so requirements. Are there other lists or requirements and are the published – how does one obtain this information?" He replies, "Only the eleven requirements apply." He is then asked, "It seems a little confusing – I feel like I've read different things, seen different things, heard different things about who requirements apply to. So are they the same for everyone or does it depend by age? Do the requirements vary by age?" He replied, "No, I have the requirements right here. There are eleven in total." Entrevista con el Dr. Manuel Ramón Morel Cerda, Presidente de la Junta Central Electoral, 8 de febrero de 2001, Victims' Petition, *supra* note 15, Anexo 48 [hereinafter Morel Cerda Entrevista].

requisitos]. Estos requisitos les son exigidos a todas las personas que desean realizar un procedimiento de declaración tardía....[25]

Given the repeated insistence by the State that eleven requirements applied in this case, Ms. Bienvenidas' insistence at trial that she required only two or four requirements of the Victims, is simply unbelievable.[26]

IV. VIOLETA WAS EXPELLED FROM DAY SCHOOL.

In the third grade, Violeta was not allowed to continue attending day school because she lacked an *Acta*. She was forced, instead, to attend adult night school, where she received an inferior education, was unable to socialize with her peers, and had to walk through a dangerous neighborhood to continue her education. The State disputes that she was forced to attend night school, and instead alleges that she did so voluntarily. The State's position is at complete odds with the overwhelming evidence. All of the declarations submitted to the Court by Violeta,[27] her mother Tiramen,[28] and her sister Teresa,[29] consistently show that Violeta was not allowed to continue day school because she lacked a birth certificate. The expert testimony of psychologist Deborah Munczek corroborates their declarations, showing that Violeta absolutely feared and hated attending night school, and would never have done so, at that age, of her own free will.[30] Additionally, the letter written by MUDHA and transmitted to the administration of the Palavé school,[31] requesting that Violeta be re-admitted to day school, demonstrates that Violeta had been expelled. Clearly, had she voluntarily left day school, no such letter would have been necessary. Similarly, Violeta would have had no need to appeal to the Commission for *medidas cautelares* to order the State to reinstate her in school, nor would the Commission have granted the extraordinary request if Violeta had not demonstrated that she had been expelled.[32] However, the most powerful evidence that Violeta has expelled, is the State's claim that it complied with the Commission's precautionary measures and readmitted Violeta.[33]

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[25] Respuesta del Gobierno 29 de Enero de 2002, *supra* note 11, at 6.

[26] When directly confronted with the list of eleven requirements and asked if she recognized them, Ms. Bienvenida avoided answering the question. *See* Bienvenida Testimony, *supra* note 5.

[27] Declaration of Violeta Bosico Cofi, Victims' Petition, *supra* note 15, Anexo 24, ¶¶ 5-16 [hereinafter Violeta Decl.]; Declaración Suplemento de Violeta Bosico Cofi, Victims' Petition, *supra* note 15, Anexo 27, ¶¶ 4-6 [hereinafter Violeta Suppl. Decl.].

[28] Tiramen Decl., *supra* note 16, ¶¶ 6-7, 11-18.

[29] Declaration of Teresa Tuseimena, Victims' Petition, *supra* note 15, Anexo 25, ¶¶ 6-8 [hereinafter Teresa Decl.].

[30] Testimony of Dr. Debora Munczek before Court, 15 March 2005 [hereinafter "Munczek Testimony"].

[31] *See* Rodriguez Testimony, *supra* note 7.

[32] The State itself acknowledged this significance of the *medidas cautelares* in its pleadings before the Commission, stating: "la representación del Gobierno dominicano en la audiencia celebrada el 6 de marzo de 2000 expresó lo siguiente: a) que el Gobierno dominicano reafirmaba su compromiso de cumplir con las medidas cautelares en favor de Dilcia Yean y Violeta Bosica a fin de evitar que las mismas pudiesen ser repatriadas injustamente y garantizarles el acceso a la educación...." Respuesta del Gobierno 29 de Enero de 2002, *supra* note 11, at 3.

[33] *Id.* at 2. In a pleading entitled "*Documento Presentado por la Delegacion de la Republica Dominicana en Ocasión de la Audiencia Sobre el Caso 12.189-Republica Dominicana Dilcia Yean Y Violeta Bosica 15 De Noviembre de 2001*" the State asserts: "El Estado dominicano había cumplido cabalmente con las medidas cautelares, esto es, que a las niñas Dilcia Yean y Violeta Bosica se le había otorgado protección provisional hasta que se determinase su status jurídico definitivo con lo cual se evitaba que pudiesen ser extrañadas de la Republica

RECENT DEVELOPMENTS

Since filing the Petition before this Court, the State has implemented new laws affecting birth registration and school admission that have a direct bearing on our reparations claims. A review of these changes underscores their insufficiency to prevent repetition of the injuries that Dilcia and Violeta suffered by the State's refusal to register their births.

I. THE NEW BIRTH REGISTRATION REGIME CONTINUES TO VIOLATE THE RIGHTS OF DILCIA AND VIOLETA.

The State has enacted new laws that alter the Dominican birth registration regime. In 2003, the JCE issued a new regulation that established revised requirements for late birth declarations. In August of 2004, the legislature passed a series of modifications to the Migration Law. At the same time, the New Code for Boys, Girls and Adolescents came into effect. Taken together, these changes do not prevent Dilcia and Violeta from suffering the same harms and in fact foster repetition of the violations.

A. JCE Resolution 07/2003 Continues to Exclude Children of Haitian Descent from Birth Registration.

The new JCE resolution eliminates several of the late birth registration requirements and modifies others.[34] Significantly, the parents no longer have to present their identity and electoral card (*cédula de identidad y electoral*) for late declarations. Instead, the JCE now requires proof of the parents' legal residency (*cédula de identidad*) to register births.[35] Yet a large number of parents of Dominican-born children of Haitian descent do not possess the residency card; either because they are immigrants residing in the country illegally, or because their parents lacked the *cédula de identidad y electoral* and they were therefore never declared.[36] For those who do qualify, the process of procuring a *cédula de identidad* can be prohibitively expensive.[37]

Like the *cédula de identidad y electoral* requirement, the *cédula de identidad* requirement prevents many children of Haitian descent who have a right to nationality from ever being able to vindicate this right by obstructing the registration of their births in the civil registry.[38] Thus, this

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dominicana, y que la documentación que avalaba dicha protección otorgada por la Dirección General de Migración, la niña Violeta Bosica podía continuar asistiendo a la escuela."

[34] The requirements for birth registration now include: the cédula de identidad; certificados de no-inscripción; constancia de nacimiento de la clínica, hospital o alcalde; constancia del bautismo; el acta de matrimonio de los padres; y dos fotografías 2x2. JCE Resolution 07/2003, REDH Jacques Viau, Amicus Brief, "*Amicus Curiae para Apoyar a las Víctimas y sus Representantes en el Caso No. 12.189: Yean y Bosica vs. La República Dominicana*," dated February 21, 2005 [hereinafter "REDH Amicus Brief"], Anexo A.

[35] *Id.* at 2.

[36] Report on the Situation of Human Rights in the Dominican Republic, Ch. IX, Situation of Haitian Migrant Workers and Their Families in the Dominican Republic, Inter-Am. Ct. H.R., OEA/Ser.L/V/II.104/Doc. 49 rev. 1, Oct. 7, 1999, ¶¶ 360, 363 [hereinafter Commission Report 1999]; Martinez Affidavit, *supra* note 17, ¶¶ 13-14.

[37] REDH Amicus Brief, *supra* note 34, at 2.

[38] *Id.* at 2-3.

JCE resolution effectively leaves Dominican-born children of Haitian descent in the same place as did its predecessor: they inherit their parents' undocumented status. Moreover, the *cédula de identidad* requirement invites State officials to discriminate in applying regulations governing birth registration.

B. Modifications to the Migration Law Aim to Deny Children of Haitian Descent Born in the Dominican Republic Their Right to Dominican Nationality.

In August of 2004, the legislature modified the existing migration law with the passage of Migration Law No. 285-04.[39] The law divides immigrants into three classes: permanent residents, temporary residents, and non-residents.[40] Significantly, the new Migration Law now attempts to interpret the Dominican constitution by stipulating that non-residents, which notably include temporary workers on the sugarcane plantations, fall into its "in transit" exception.[41] Article 11 of the Dominican constitution confers nationality on all individuals born in its territory unless their parents are "in transit" or diplomats. Consequently, this addition to the new Migration Law prevents the children of non-residents from registering their births and enjoying Dominican nationality in direct violation of their right to Dominican nationality.

Moreover, the law excludes undocumented immigrants who intend to stay in the country from the immigrant categories. The law defines residents as those foreigners who obtain permission to enter the country with the intention of residing or establishing themselves permanently in Dominican territory.[42] Non-residents, on the other hand, are defined as those foreigners with authorization to enter the country without the intention of staying.[43] Immigrants that do not qualify as permanent or temporary residents and intend to remain in the Dominican Republic are simply left aside. As a result, children of undocumented migrants are left in legal limbo: no law regulates the birth registration of their children, even though under the constitutionally embedded principle of *jus soli* their children have a right to registration and nationality. In other words, the children of the hundreds of thousands of Haitians that live in the Dominican Republic without official residency status are denied their right to Dominican nationality.[44]

Another relevant modification to Migration Law 95 provides that "all health centers that assist the delivery of a foreign woman that has documentation corresponding to legal residents, will issue a pink *constancia de nacimiento* different from the official *constancia de nacimiento* that includes all of the mother's personal information."[45] Under the Dominican constitution and

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[39] *Id.*, Anexo C.
[40] Migration Law No. 285-04, arts. 29-32, REDH Amicus Brief, *supra* note 34, Anexo C [hereinafter Migration Law No. 285-04].
[41] REDH Amicus Brief, *supra* note 34, at 11.
[42] "Será considerado como Residente el extranjero que, conforme a la actividad que desarrolle y/o de sus condiciones, ingresa al país con intención de radicarse o permanecer en el territorio dominicano." Migration Law No. 285-04, *supra* note 40, art. 30.
[43] "Se considera como No Residente al extranjero que, en razón de las actividades que desarrollare, el motivo del viaje y/o de sus condiciones, ingresa al país sin intención de radicarse en él." *Id.*, art. 32.
[44] Martinez Affidavit, *supra* note 17, ¶ 14.
[45] "Todo centro de salud que al momento de ofrecer su asistencia de parto a una mujer extranjera que cuente con la documentación que la acredite como residente legal, expedirá una Constancia de Nacimiento de color rosado

the principle of *jus soli*, however, the children of legal residents and undocumented migrants have the same right to birth registration and nationality as do the children of nationals. In other words, there is no legitimate purpose for this color-coding scheme. As the hospital *constancias de nacimiento* must be presented for birth registration, this measure singles out the children of legal immigrants so as to encumber their registration, and thus their acquisition of nationality.

The new Migration Law does not improve the situation of Dominican-born children of Haitian descent. By expanding the "in transit" exception in its arbitrary interpretation of the Dominican constitution, the law intentionally excludes the children of Haitian migrant workers from vindicating their right to Dominican nationality. By leaving undocumented immigrants in legal limbo, it also overlooks their right to register their children. By singling out the children of foreigners for pink certificates of birth, it erodes the rights of legal residents as well.

Not only do these measures expressly target the children of foreigners, they disproportionately and adversely impact children of Haitian descent generally. As applied by State officials, the presumption that children of Haitians are Haitian nationals extends to children of Haitian descent whose parents are legal residents or even Dominican nationals, like Dilcia and Violeta. Until these measures are rectified, all children of Haitian descent will be categorically considered illegal Haitian nationals.

C. The New Code for the Protection of Boys, Girls, and Adolescents Is Ineffective.

The New Code for Boys, Girls, and Adolescents went into effect in August 2004. Article 4 establishes that children have a right to a name and nationality and provides that children should be identified and registered immediately following birth.[46] Similarly, Article 5 provides that all children "have the right to be inscribed in the Registry of Civil Status, immediately after their birth in accordance with the law."[47] Apparently referring to late declarations, Paragraph II of Article 5 adds, "the State must guarantee free, simple, and rapid procedures for the opportune registration of boys, girls, and adolescents that have not been inscribed timely."[48]

Despite these apparent advances, the New Code suffers from several shortcomings. First, it has yet to be implemented. The mechanisms to protect the rights established therein have not been put in place.[49] Second, these Code provisions, by their own terms, qualify the rights they grant by indicating that they must be applied "in accordance with the law."[50] As demonstrated above, the new Migration Law makes no provision for the birth registration of children born to parents who are not legal residents. Rather, it expressly denies the right of nationality to children whose parents are migrant workers. Despite the Code's liberal wording, then, it does nothing to regularize the situation of children born to undocumented parents.

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diferente a la Constancia de Nacimiento Oficial, con todas las referencias personales de la madre." Migration Law No. 285-04, *supra* note 40, art. 28(1).

[46] New Code for the Protection of Boys, Girls, and Adolescents No. 136-03, art. 4, REDH Amicus Brief, *supra* note 34, Anexo B [hereinafter New Code for the Protection of Boys, Girls, and Adolescents].

[47] "Todos los niños, niñas and adolescentes tienen derecho a ser inscritos en el Registro del Estado Civil, inmediatamente después de su nacimiento, de conformidad con la ley." *Id.*, art. 5.

[48] "El Estado debe garantizar procedimientos gratuitos, sencillos y rápidos para la inscripción oportuna de los niños, niñas y adolescentes que no hayan sido inscritos oportunamente." *Id.* art. 5.

[49] REDH Amicus Brief, *supra* note 34, at 8-9.

[50] New Code for the Protection of Boys, Girls, and Adolescents, *supra* note 46, arts. 4-5.

The new law ensures that the pattern of discrimination and exclusion against children of Haitian descent will continue and these children, like Dilcia and Violeta, will inherit their parents' presumed illegal status. Consequently, the new law likewise cannot guarantee non-repetition of harm.

II. NOTWITHSTANDING LEGAL PROTECTIONS, OFFICIAL STATE POLICY PREVENTS CHILDREN OF HAITIAN DESCENT FROM ENROLLING IN SCHOOL.

Paragraph II of Article 45 of the New Code for Boys, Girls and Adolescents establishes that children cannot be denied an education because they do not possess identity documents.[51] If respected, such a measure would provide access to education for thousands of children of Haitian descent. Unfortunately the gap between law's promise and the reality on the ground is vast.

Despite this Code provision, the Ministry of Education recently announced that children may only attend elementary school until the fourth grade without a birth certificate.[52] Thereafter, they will not be allowed to enroll. Given that the children of the estimated hundreds of thousands of Haitians without legal status in the Dominican Republic face impassable administrative hurdles to registering their births,[53] this official disposition prevents countless children from accessing education. Clearly, the right to education is still vulnerable to the vicissitudes of anti-Haitian politics and abuse of discretion. The consequences for this policy are manifold; denial of education has significant repercussions for children, including the perpetuation of poverty.[54]

JURISDICTION

On March 25 1999, the day the Dominican State accepted the jurisdiction of the Court, Dilcia and Violeta were in the same position as when, less than a year earlier, the complaint was presented on their behalf before the Commission. The girls did not have their birth certificates; in the eyes of the law they had no name, identity or nationality; they did not have access to a competent, independent and impartial judge or tribunal in which to vindicate their rights; and having been expelled from day school, Violeta was forced to attend night school for adults. To this day, the girls' situation remains precarious. While they now possess their *Actas*, the State

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[51] "En ningún caso podrá negarse la educación a los niños, niñas y adolescentes alegando razones como: la ausencia de los padres, representantes o responsables, *la carencia de documentos de identidad* o recursos económicos o cualquier otra causa que vulnere sus derechos." New Code for the Protection of Boys, Girls, and Adolescents, *supra* note 46, art. 45, ¶ 2.

[52] Listin Diario, *Limitan inscripción sin actas nacimiento hasta cuarto grado*, 13 September 2004 *in* REDH Amicus Brief, *supra* note 34, Anexo J [hereinafter *Limitan inscripción*].

[53] Martinez Affidavit, *supra* note 17, ¶ 28.

[54] *See* Martinez Affidavit, *supra* note 17, ¶ 54; *see also*, Martin Carnoy, Prof. of Education and Economics, Stanford University, President, Comparative & International Education Society [CIES], et al., Amicus Brief, "Benefits of Education for Dominicans of Haitian Origin: A Review of Evidence," dated March 25, 2005 [hereinafter CIES Amicus].

issued these documents in violation of JCE regulations and therefore they could be revoked at any time.

As the Commission noted in its complaint, the Court does not have temporal jurisdiction over those events which occurred before March 25, 1999. Nonetheless, the Court retains jurisdiction over the principal facts at issue in this case. The dispossession of Dilcia's and Violeta's fundamental rights was not the result of a single state act or omission, but the consequence of a series of actions and omissions which constitute a practice and policy of discrimination and exclusion. The facts that occurred before the State's acceptance of the Court's jurisdiction should be considered antecedents.

While the civil registrar's refusal to register Dilcia and Violeta's births took place before the State accepted the Court's jurisdiction, her decision subsequently was ratified by the *Procurador Fiscal* and enforced by the JCE.[55] Additionally, the State reaffirmed its refusal to register the girls in pleadings submitted to the Commission. Despite domestic and international advocacy efforts, the girls were not issued their *Actas* until August, 2001.

During the procedure before the Commission, the State based its denial of Dilcia and Violeta's birth certificates on the fact the girls had not fulfilled the list of eleven requirements established by the JCE. This position is articulated by the *Procurador Fiscal* July 20 1998 decision and reiterated by the State's response to petitioner's complaint as well as subsequent pleadings. In a September 20, 1999 letter from the civil registrar, Mrs. Bienvenida, to the JCE, Ms. Bienvenida asserts "en ningún momento ha habido denegación por parte nuestra, ya que en todo momento le fue explicado a los interesados cuáles eran los requisitos necesarios para la declaración Tardía, documentos que ellos tenían que aportar [...]."[56] Ms. Bienvenida attaches a list of the eleven requirements issued by the JCE to the letter. This same letter serves as the basis of the opinion of the President of the JCE that Dilcia and Violeta had not provided the documents necessary for a late registration. This position is reaffirmed in a June 2000, pleading by the State: "[a] los solicitantes no se les ha negado el Derecho de registrar a las menores, sino que más bien se les ha exhortado a reencausar sus pretensiones dando cumplimiento a las disposiciones establecidas por la Junta Central Electoral."[57]

Until the State chose to circumvent its own regulations and issue Dilcia and Violeta their birth certificates, the arbitrary and discriminatory list of requirements, made it impossible for the girls to register. Only recently, the State reduced the eleven requirements. However, the birth registration reforms did not translate into relief for children of Haitian immigrants. The new procedures require proof of the parent's legal status, the requirement which is proven to discriminate most heavily against Dominican children of Haitian descent.

Nor have the reforms addressed the absence of a simple and prompt judicial recourse. Clearly, the current system does not provide an adequate and effective avenue of redress; a

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[55] *See* Procurador Orden, *supra* note 20; Carta de noviembre 22, *supra* note 22; Carta de 27 de septiembre, *supra* note 22.
[56] *Id.*
[57] *See* Carta de la Secretaría de Estado de Relaciones Exteriores, Eduardo LaTorre, DEI-00-343, al CIDH, 7 de junio de 2000.

situation consistently ignored by the State. Due to the State's omissions, applicants like Dilcia and Violeta denied their *Actas* will also be denied their day in Court.

The denial of Violeta's rights to education is also a result of multiple state acts. Although the State expelled Violeta from school in late 1998, she continued to be excluded from an accessible and acceptable primary education until September 1999, when she was reenrolled in compliance with precautionary measures issued by the Commission. The Palavé School Director enforced her decision regarding Violeta's expulsion throughout the 1998-1999 school year despite MUDHA repeated efforts to secure her readmission.

In addition to the series of acts and omissions committed by the State after accepting jurisdiction of the Court, the State's acceptance does not bar the Court from considering facts which occurred previous to the date of acceptance. In contrast to other cases considered by the Court, the Dominican Republic's acceptance does not impose temporal limitations on the jurisdiction of the Court. On March 25th 1999, the Dominican State unconditionally accepted the Court's jurisdiction:

> El Gobierno de la República Dominicana por medio del presente instrumento, declara que reconoce como obligatoria de pleno derecho y sin convención especial, la competencia de la Corte Interamericana de Derechos Humanos sobre todos los casos relativos a la interpretación o aplicación de la Convención Americana sobre Derechos Humanos, del 22 de noviembre de 1969.

In accordance with international law, the Dominican Republic's obligation to respect and guarantee the rights protected by the Convention originates with the ratification of that instrument and not the acceptance of jurisdiction of the Court.[58] Consequently, the Dominican State had a good faith duty to comply with Convention as of April 19, 1978, the date of ratification of that treaty.[59] The State did not fulfill this duty. Furthermore, a literal interpretation of the text of the State's acceptance specifies the State's intention for the Court to consider *all cases* related to the interpretation and application of the Convention.

At the public hearing, the State reiterated the Commission's position regarding the Court's jurisdiction, expressing its approval. In accordance with the Commission's position, we request that the Court reaffirm its jurisdiction over the case, and exercise its authority to determine state responsibility of the alleged violations.

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[58] *See* Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679, *entered into force* January 27, 1980. Article 14 establishes that "Consent to be bound by a treaty expressed by ratification, acceptance or approval 1. The consent of a State to be bound by a treaty is expressed by ratification when: a. The treaty provides for such consent to be expressed by means of ratification [...]"

[59] *See* Loayza Tamayo, Judgment of September 17, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 33, ¶ 80.

The State argues that this Court does not have jurisdiction to decide this case because: (1) the State complied with the terms of a Friendly Settlement rendering the case moot and (2) the Victims have not exhausted their judicial remedies. The State's arguments wholly miss the mark.

I. THIS CASE IS NOT MOOT

The Dominican Republic claims that this case is now moot. Because the Victims were granted their birth documents in 2001, it argues the underlying rights violations have been repaired.[60]

As argued in the Victims' Response to Preliminary Exceptions, the *Actas* the State granted to the Victims in 2001 do not resolve this case. Under the Inter-American System as well as the European System, a case is not resolved until the rights violations have been both acknowledged and fully repaired.[61] In this case, the State has never acknowledged the violation. As it writes in its Petition, "el Estado en ningún momento ha irrespetado o violado de forma alguna, ni por acción ni por omissión, los derechos humanos ...[de] Dilcia Yean y Violeta Bosica Cofi."[62]

Nor has the State repaired the violation. In 2001, the State granted the Victims their birth certificates in spite of the fact that the Victims had not met what the State itself understood to be the late birth registration requirements.[63] Because the documents were granted in violation of the governing law, they are subject to revocation at any time. Effectively, these illegal documents

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[60] "[L]a entrega de esas Actas permitieran las ninas Dilcia Yean y Violeta Bosical sus documentos que es el objeto de esta demanda." State's Response, *supra* note 5, ¶ 45.

[61] In the *Barrios Altos Case*, the Court closed the case only once Peru accepted the facts and acknowledged its international responsibility for its violations. Judgment of March 14, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 75, ¶ 38. In the *Cantorral Benavides Case*, the Court concluded that the State's pardon of a victim did not amount to acknowledgement of the wrong, and thus did not resolve the case. Judgment of July 18, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 69, ¶¶ 195-96. In *Eckle vs. Germany,* the European Commission established three criteria for determining when a case has been resolved: 1) acknowledgement of the violation; 2) full reparations; 3) that the reparations reflect the acknowledgement of the violation of the Convention. Judgment of July 15, 1982, European C.H.R; *see also*, Victims' Response to Preliminary Exceptions submitted by the Dominican Republic in relation to the case of the Girls Dilcia Yean and Violeta Bosico, presented to the Court January 21, 2004, at 10 [hereinafter Victims' Response to Preliminary Exceptions].

[62] State's Response, *supra* note 5, ¶ 6.

[63] In September 2001, a representative of the Secretary of Exterior Relations, Annabella de Castro, contacted Violeta's legal representatives to inform them that the State would issue Dominican birth certificates to the girls. In response, on September 21, 2001, Dilcia and Violeta's mothers went to the Civil Registry in Santo Domingo and successfully registered their daughters' births. Violeta's mother, Tiramen, presented only her *cédula* and a declaration from the mayor of Sabana Grande de Boyá that affirmed that Violeta was born in the Dominican Republic. Dilcia's mother, Leonidas, presented her *cédula* and the certificate from the hospital where Dilcia was born, confirming Dilcia's birth in the Dominican Republic. Clearly they had not met the eleven requirements that the State then imposed for late birth registration. Neither had they met the six requirements under the newest JCE regulations. JCE Resolution 07/2003, *supra* note 34. Nonetheless, four days later, on September 25, 2001, both Dilcia and Violeta received their birth certificates. *See* Certificado de Declaración de Nacimiento de Dilcia Yean, Victims' Petition, *supra* note 15, Anexo 14; Certificado de Declaración de Nacimiento de Violeta Bosico Cofi, Victims' Petition, *supra* note 15, Anexo 15.

left Dilcia and Violeta exactly as before, condemned to a permanent state of legal vulnerability, with indeterminate privileges instead of human rights guarantees.[64] Indeed, it is difficult to avoid the suspicion that the State only granted the documents as a way to avoid the scrutiny of its birth registration system by the Commission and the Court. States should not be allowed to evade the jurisdiction of the Inter-American Court by arbitrarily disregarding their own laws.[65]

The State's claim that a series of new laws and rules governing registration place it in compliance with the Dominican constitution and the Convention suffers from the same weakness: it does not satisfy the requirements of acknowledgement of the violation and reparation for the harms it caused.

Moreover, it is also clear that in light of this Court's recent jurisprudence, the State's grant of *cédulas* does not limit the jurisdiction of the Court over this case. In *Canese v. Paraguay*, the State argued that because it had overturned the criminal sanctions against the victim, the Court should find that no violation had occurred.[66] The Court rejected this argument, holding that because the complaint was filed with and opened by the Commission before the State had overturned the sentences, both the Commission and the Court could hear the case. The Court reasoned:

> La Corte debe recordar que la responsabilidad internacional del Estado se genera de inmediato con el ilícito internacional, aunque sólo puede ser exigida después de que el Estado haya tenido la oportunidad de repararlo por sus propios medios. Una posible reparación posterior llevada a cabo en el derecho interno, no inhibe a la Comisión ni a la Corte para conocer un caso que ya se ha iniciado por supuestas violaciones a la Convención Americana, tal como el presente que se inició en el sistema interamericano en julio de 1998. Es por ello que la sola emisión de las mencionadas decisiones por la Sala Penal de la Corte Suprema de Justicia del Paraguay en agosto y diciembre de 2002 no pueden ser consideradas por la Corte como elementos para dejar de conocer sobre las alegadas violaciones a la Convención Americana supuestamente ocurridas con anterioridad a su emisión.[67]

II. THE *RECURSO DE INCONSTITUCIONALIDAD* DOES NOT PROVIDE AN EFFECTIVE OR ADEQUATE REMEDY IN THIS CASE.

In its Preliminary Exceptions argument, the State for the first time raised the argument that the Victims should have filed a *Recurso de Inconstitucionalidad*. The Court has firmly established that when a state raises the defense of lack of exhaustion of remedies, it carries the

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[64] For further elaboration of this argument, we respectfully refer the Court to the Victims' Petition, *supra* note 15, at 73.
[65] *Loayza Tamayo Case,* Reparations (Art. 63(1) American Convention on Human Rights), Judgment of November 27, 1998, Inter-Am. Ct. H.R. (Ser. C) No. 42, ¶ 34 [hereinafter *Loayza Reparations*] (arguing that the State must comply with its own Constitution in repairing the harm); *see also* Victims' Petition, *supra* note 15, at 74.
[66] *Ricardo Canese v. Paraguay Case,* Judgment of August 31, 2004, Inter-Am. Ct. H.R. (Ser.C) No. 111.
[67] *Id.* ¶ 71. The Court reached a similar holding in *Gomez-Paquiyauri*, *supra* note 1, ¶ 75

burden of establishing that the remedies for which it argues are effective and appropriate.[68] The State did not meet this burden.

The State has not shown that the *Recurso de Inconstitucionalidad* is effective, or "capáz de producir el resultado para el que ha sido concebido."[69] In the first place, as argued in the Victims' Response to Preliminary Exceptions, this writ has never been clearly regulated, and the procedures surrounding it were still unclear at the time the violation took place.[70]

Moreover, the Dominican Supreme Court only recognized the possibility to challenge the constitutionality of administrative acts or executive decrees through a writ of unconsititutionality in a case decided in late 1998. Before its August 8, 1998 decision in *Sederias California v. Manuel Fernandez Rodriguez & Co. and the State of Dominican Republic*, writs of unconstitutionality were actionable only against formal laws passed by the legislature.[71] Therefore, Victims were unable to appeal the administrative decision to deny Dilcia and Violeta their birth certificates or to challenge the legality of the eleven requirements issued by the JCE through a writ of unconstitutionality.[72]

III. VICTIMS' RESPONSE TO STATE'S ARGUMENTS AT TRIAL.

At trial, the State presented a new argument regarding exhaustion of domestic remedies.[73] They claimed that Article 35 of Law 659 would have allowed the Victims to appeal the denial of their registrations to a court of first instance. This argument is simply incorrect. Article 35 of Law 659 states in pertinent part:

> La falta de cumplimiento de cualquiera de los artículos anteriores por parte del Oficial del Estado Civil, será perseguida por ante el Tribunal de Primera Instancia de la jurisdicción y castigada con una multa....[74]

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[68] *Castillo Páez Case*, Preliminary Exceptions, Judgment of January 30, 1996, Inter-Am. Ct. H.R. (Ser. C) ¶ 40; *see also Velásquez Rodríguez Case*, Preliminary Exceptions, Judgment of June 26, 1987, Inter-Am. Ct. H.R. (Ser. C) No. 1, ¶ 88; *Fairén Garbi y Solís Corrales Case*, Preliminary Exceptions, Judgment of June 26, 1987, Inter-Am. Ct. H.R. (Ser. C.) No. 2 ¶ 87; *Godínez Cruz Case*, Preliminary Exceptions, Judgment of June 26, 1987, Inter-Am. Ct. H.R. (Ser. C) No. 3, ¶ 90; *Gangaram Panday Case*, Preliminary Exceptions, Judgment of December 4, 1991, Inter-Am. Ct. H.R. (Ser. C) No. 12, ¶ 38; *Neira Alegría Case*, Preliminary Exceptions, Judgment of December 11, 1991, Inter-Am. Ct. H.R. (Ser. C) No. 13, ¶ 3.

[69] *Velasquez Rodriguez Case,* Judgment of July 29, 1988, Inter-Am. Ct. H.R. (Ser. C) No. 4, ¶ 167 [hereinafter *Velasquez Rodriguez Judgment*].

[70] There is no law regulating this writ. Law 821 over judicial organization grants the Supreme Court power to define the writ's procedures, but as of 2000, the Supreme Court had been inconstant in its rulings over procedure. *See* Dr. José Rutinel Domínguez, DICCIONARIO DE POLÍTICA Y DERECHO CONSTITUCIONAL DE LA REPÚBLICA DOMINICANA, Tomo II (Dirección de Publicaciones Editora Universitaria de la Universidad Autónoma de Santo Domingo, 2000), 794-96. *See also* Victims' Response to Preliminary Exceptions, *supra* note 61, at 7-8.

[71] Attached to this Memorandum at Exhibit A.

[72] See Arguments of the Victims' before Court, Regarding Preliminary Exceptions, 14 March 2005; *see also* Rincón Testimony, *infra* note 106.

[73] *See* State Preliminary Exceptions Argument, *supra* note 4.

[74] Ley No. 659 Sobre Actos del Estado Civil de la República Dominicana, 17 de julio de 1944, G.O. 6114, Victims' Petition, *supra* note 15, Anexo 1.

As the language plainly states, such an action can only be brought for violation of the "artículos anteriores" to Article 35. The Articles leading up to Article 35 serve two functions: (1) Articles 1 through 9 establish, in general terms, the organizational structure of the Oficinas and Oficiales de Estado Civil;[75] and (2) Articles 10 through 34 establish the bookkeeping duties of the Oficiales (for example, how to request another *registro* when one fills up (Art. 16), what to do if a record is lost or destroyed (Arts. 20-23), how the bookkeeping system is verified each year (Arts. 13-15, 18-19), etc.).

The duties of the *Oficiales del Estado Civil* in relation to birth registration do not start until Article 38, and continue to Article 54.[76] The "*Tribunal de Primera Instancia*" provision in Article 35 thus does not apply to failures of the *Oficiales* to follow the birth registration regulations. The State suggested at trial that the denial of birth registration would be a violation of Article 6, and therefore be subject to Article 35. Article 6, however, is a general provision which simply describes who the *Oficial del Estado Civil* is. It states:

Son atribuciones del Oficial del Estado Civil:

> a) Recibir e instrumentar todo acto concerniente al Estado Civil;
>
> b) Custodiar y conservar los registros y cualquier documento en relación con los mismos;
>
> c) Expedir copias de las actas del Estado Civil y de cualquier documento que se encuentre en su archivo;
>
> d) Expedir los contractos y certificados de los actos relativos al Estado Civil.[77]

It would be illogical to claim a violation of an "*atribución.*" Article 35 is clearly designed to punish *Oficiales* where they have failed in their bookkeeping duties, and nothing more.

Furthermore, if Article 35 allowed appeal of birth registration denial before a court of first instance, certainly there would exist evidence of this possibility. The State has presented no evidence that such an Article 35 appeal has ever been brought. The *Procurador Fiscal* did not mention this possibility in his decision.[78] Neither did the president of the JCE, who oversees all of the *Oficialias del Estado Civil.*[79]

The ability to appeal a denial of birth registration through Article 35 is flawed in theory, and simply does not occur in practice.

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[75] Law 659 is divided into 12 Titles. Articles 1-9 fall under Title I, "De las Oficinas y de los Oficiales del Estado Civil." Articles 10-37 fall under Title II, "De los registros y de las actas del Estado Civil." *Id.*

[76] Articles 38-54 comprise Title III, which is entitled "Del registro de nacimiento, del acta de nacimiento y del acta del reconocimiento del hijo natural." *Id.*

[77] *Id.*

[78] *See* Victims' Petition, *supra* note 15, Anexo 3.

[79] *See* Morel Cerda Entrevista, *supra* note 24 (he only mentioned the possibility of appeal to the JCE).

ARGUMENTS ON THE MERITS

I. ARTICLE 19 MUST BE READ AS INFUSING THE CONVENTION AS A WHOLE WITH A HEIGHTENED STANDARD OF PROTECTION FOR CHILDREN.

Because this case addresses the rights of children, Article 19 mandates that the Court analyze and apply all of the Convention rights at stake with particular vigor.

Convention Article 19 provides that:

> Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.

The Court has firmly established that under the American Convention and the Convention on the Rights of the Child ("CRC"), children are granted heightened protection.[80]

The Court has also established that Article 19 should be read in conjunction with other Convention rights, so that *each* Convention right affords children a "special," [81] more "rigorous"[82] standard of protection. In *Instituto de Reeducación,* the victims' status as children triggered heightened scrutiny: "Esta Corte analizará el presente caso teniendo este hecho en particular consideración, y decidirá sobre las violaciones alegadas respecto de otros derechos de la Convención Americana, a la luz de las obligaciones adicionales que el artículo 19 de la misma impone al Estado."[83] Convention rights have a different, heightened meaning when read in tandem with Article 19: "[E]l hecho de que las presuntas víctimas fueran niños obliga a la aplicación de un estándar mas alto."[84]

In order "to define the scope of the 'measures of protection' referred to in Article 19 of the American Convention", the Court relies on the "very comprehensive international *corpus juris* for the protection of the child"[85] and the provisions of the CRC.[86] In particular, the Court has incorporated CRC Article 3, which articulates the principle of the best interest of the child, into Article 19:

> [C]uando se trata de la protección de los derechos del niño y de la adopción de medidas para lograr dicha protección, rige el principio del interés

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[80] *Legal Status*, *supra* note 1, ¶ 54.
[81] *Id.*, ¶ 60 (emphasis added).
[82] *Instituto de Reeducación*, *supra* note 1, at 230.
[83] *Id.* ¶¶ 47-48.
[84] *Gómez Paquiyauri*, *supra* note 1, ¶ 170.
[85] *Street Children Case*, *supra* note 1, ¶ 194.
[86] *Id.* ¶ ¶ 195-196. In its advisory opinion on Article 19, the Court stresses that the CRC "has been ratified by almost all the member States of the Organization of American States," adding "[i]f this Court resorted to the Convention on the Rights of the Child to establish what is meant by child in the framework of a contentious case, all the more so can it resort to said Convention…when it exercises it advisory jurisdiction." *Legal Status*, *supra* note 1, ¶¶ 29-30.

> superior del niño, que se funda en la dignidad misma del ser humano, en las características propias de los ninos y en la necesidad de propiciar el desarrollo de éstos, con pleno aprovechamiento de sus potencialidades.[87]

Thus Article 19 imposes a higher standard of scrutiny when the rights of children are implicated. It also defines that standard, giving pride of place to the child's special interest.[88]

Dilcia and Violeta were both minors when the State denied them their *Actas*; and when Violeta was excluded from school for not having her birth documents. The State's acts and omissions prejudiced the Victims and violated their rights to non-discrimination, education, nationality, due process and judicial protection, judicial personality, name, and family. As in *Instituto de Reeducación,* the Court should analyze each claimed rights violation in light of its "inexorable link"[89] to Article 19, applying to it a more rigorous standard tailored to the best interest of the child.

II. THE STATE VIOLATED DILCIA'S AND VIOLETA'S RIGHT TO FREEDOM FROM DISCRIMINATION AND EQUAL PROTECTION UNDER ARTICLES 1(1), 19 AND 24.

The Court has firmly established that the principles of non-discrimination and equal protection, embodied in Articles 1(1) and 24, belong to *jus cogens*,[90] and that together they "[prohibit] all discriminatory treatment originating in a legal prescription," and oblige States Parties to "maintain their laws free of discriminatory regulations."[91] When, as in this case, discrimination affects the rights of children, state law and practice must be examined with "most strict" scrutiny, because of "the child's position of vulnerability and disadvantage as well as the child's inability to have any effect on its situation."[92]

Though there are numerous ways to test for discrimination, the essential rule in the Inter-American system and under international law generally, is that a distinction, exclusion, restriction, or preference:

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[87] *Id.* ¶¶ 56, 59; *Bulacio*, *supra* note 1, ¶ 134; *Gómez Paquiyauri*, *supra* note 1, ¶ 163.
[88] *Legal Status, supra* note 1, ¶ 137.
[89] *Street Children Case*, *supra* note 1, ¶ 7 (Judge Cançado Trindade concurring).
[90] *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Sept. 17, 2003, Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003), ¶ 101 [hereinafter *Undocumented Migrants Advisory Opinion*].
[91] *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, Advisory Opinion OC-4/84, January 19, 1984, Inter-Am. Ct. H.R. (Ser. A) No. 4, ¶ 54 [hereinafter *Proposed Amendments Advisory Opinion*].
[92] ODDNY MJOLL ARNARDOTTIR, EQUALITY AND NON-DISCRIMINATION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS 48 (2003) [hereinafter EQUALITY AND NON-DISCRIMINATION] (citing *Marckx v. Belgium*, Judgment of June 13, 1979, Eur. Ct. H.R. (Ser. A) No. 31; *Inze v. Austria*, Judgment of October 28, 1987, Eur. Ct. H.R. (Ser. A) No. 126; *Vermiere v. Belgium*, Judgment of November 29, 1991, Eur. Ct. H.R. (Ser. A) No. 214-C; *Mazurek v. France*, February 1, 2000, Eur. Ct. H.R., at *http://hudoc.echr.coe.int/hudoc/.*) (In cases involving discrimination on the basis of "illegitimacy," when the principle effect of the discrimination is on the child, the Court applies very strict scrutiny; when it affects the father, "the scrutiny applied does not seem as uniformly strict.").

1. Must not have the purpose or effect of impairing the rights of a group,[93] and;

2. Must have legitimate justification, and;

3. The criteria used to restrict must be proportionate to the legitimate justification.

The Court first established this framework in Advisory Opinion OC-4/84,[94] and reaffirmed it in Advisory Opinion OC-18/03, stating: "A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a *legitimate aim*," the right to equal protection "is likewise violated when it is clearly established that there is *no reasonable relationship of proportionality* between the means employed and the aim sought to be realized."[95]

International law, as expressed through this framework, prohibits both direct discrimination, where policies or practices distinguish, on their face, on the basis of protected categories, as well as indirect discrimination or discriminatory effect, where a difference in treatment arises from facially neutral policies or practices. This principle is firmly established by the UN Committee on the Elimination of Racial Discrimination,[96] the U.N. Human Rights Committee,[97] the European Court of Human Rights,[98] and the European Court of Justice.[99]

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[93] "Discrimination" refers to "any distinction, exclusion, restriction or preference . . . which has the *purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise by all persons, on equal footing, of all rights and freedoms." Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI\GEN\1\Rev.1 at 26 (1994), *available* in Spanish at <http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/db9c702d68c07d998025 652a00370732?Opendocument> and in English at http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/ 3888b0541f8501c9c1263ed004b8d0e?Opendocument. This definition, established by the Committee on Human Rights, is taken from the Convention on the Elimination of All Forms of Racial Discrimination, art. 1, 660 U.N.T.S. 195, 220, 5 I.L.M. 352, entered into force Jan. 14, 1969 and the Convention on the Elimination of All Forms of Racial Discrimination against Women, art. 1, 1249 U.N.T.S. 13, 19, I.L.M. 33, entered into force Sept. 3, 1981.

[94] *Proposed Amendments Advisory Opinion*, *supra* note 91, ¶¶ 56-57, 61 ("[N]ot all differences in legal treatment are discriminatory as such, for not all differences in treatment are in themselves offensive to human dignity . . . . [A] difference in treatment is only discriminatory when it has not objective and reasonable justification." . . . There must exist "a reasonable relationship of proportionality between these differences and the aims of the legal rule under review.")

[95] *Undocumented Migrants Advisory Opinion*, *supra* note 90, ¶ 90 (emphasis added) (quoting Eur. Ct. H.R.).

[96] "In seeking whether an action has an effect contrary to the Convention, it will look to see whether that action has an *unjustifiable disparate impact* upon a group distinguished by race, colour, descent, or national or ethnic origin." UN Committee on the Elimination of Racial Discrimination, General Comment, 24 March 1993, ¶ 2 (emphasis added).

[97] *See Broeks v. The Netherlands*, No. 172/184, UN Human Rights Committee (finding a violation of sex discrimination, even though the State had not intended to discriminate); *see also Simunek et al. Czech Republic,* No. 516/1992, Human Rights Committee, ¶ 11.7.

[98] "Where a policy or measure has *disproportionately prejudicial effects* on a particular group, it is not excluded that *this may be considered as discriminatory, notwithstanding that it is not specifically aimed or directed at that group." Hugh Jordan v. The United Kingdom*, Eur. Ct. H.R., 04.05.2001, ¶ 154, at http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&key=33164&portal=hbkm&source=external&table=2859

Though the Inter-American Court has not specifically addressed a case of such discriminatory effect, it has agreed with the United Nations Committee on Human Rights' definition of discrimination, which prohibits any distinctions having "the purpose *or effect*" of impairing equal enjoyment of rights and freedoms.[100] Furthermore, the Court has established: "States must abstain from carrying out any action that, in any way, directly *or indirectly*," creates "situations of *de jure or de facto* discrimination."[101]

In this case, the Dominican Republic has violated Articles 1(1) and 24 through both directly discriminatory actions, and through policies and practices having a discriminatory effect on Dilcia and Violeta. The State purports to have legitimate aims for its discriminatory actions and policies. However, the State's aims clearly have both the purpose and the effect of impairing the rights of the Dominico-Haitian population and the legitimacy of these aims is questionable. Moreover, the means employed by the Dominican Republic to achieve these purported aims are disproportionate in view of their impact on the rights of children. The State therefore fails the test established by this Court.

A. The Actions of the Civil Registrar Constitute Direct, Purposeful Discrimination in Violation of Articles 1(1) and 24.

The Dominican constitution as well as Dominican law establishes that "Dominicans are all persons born in the territory of the Republic."[102] As the State has conceded, Dilcia and Violeta were born in the Dominican Republic, and had the right to register. Nonetheless, when the Victims' families presented the *cédulas* of the Victims' mothers and the Victims' proof of birth in the Dominican Republic,[103] as required by local policy and practice,[104] the civil registrar denied their rightful applications for registration because of their ethnicity and the nationality of their parents and ancestors.[105] Ms. Bienvenidas stated that she could not register the Victims because of their "strange first and last names," and because their parents were Haitian.[106] Her

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53B33D3AF94893DC49EF6600CEBD49 (emphasis added); s*ee also McShane v. The United Kingdom*, Eur. Ct. H.R., 28.08.2002, ¶135.

[99] *See, e.g.*, Case 127/92, *Enderby v. Frenchay Health Authority*, 1993 E.C.R. I-5535; Case 96/80, *Jenkins v. Kingsgate (Clothing Productions) Ltd.*, 1981 E.C.R. 911.

[100] *Undocumented Migrants Advisory Opinion*, *supra* note 90, ¶ 92 (emphasis added).

[101] *Id.* ¶ 103 (emphasis added).

[102] The Constitution of the Dominican Republic, 1966 (as amended 2002), art. 11, Victims Petition, *supra* note 15, Anexo 20. Código Civil de la República Dominicana, art. 9, Victims' Petition, *supra* note 15, Anexo 44 (establishing that "Dominicanos son todas las personas que hayan nacido o nacieren en el territorio de la República, *cualquiera que sea la nacionalidad de sus padres*.") (emphasis added) [hereinafter Cód. Civ.].

[103] Rincón Decl., *supra* note 15, at 6. Dilcia submitted the birth certificate issued by the Centro de Salud de Sabana Grande de Boyá. Violeta submitted the birth certificate issued by the Mayor of Batey Las Charcas, which asserts that she was born in and lived in the Dominican Republic. Certificado de Nacimiento de Dilcia Yean, Victims' Petition, *supra* note 15, Anexo 7; Declaración de Aldadea Pedanea, Victims' Petition, *supra* note 15, Anexo 8.

[104] Oficialía De Estado Civil De La 2DA. Circ., D.N., *Requisitos Para Declaraciones Tardias y Ratificación Por Sentencia*, Victims' Petition, *supra* note 15, Anexo 6.

[105] Rincón Decl., *supra* note 15, at 6. Tiramen Decl., *supra* note 16, ¶ 10. Violeta Decl., *supra* note 27, ¶ 5. Teresa Decl., *supra* note 29, ¶ 5. Leonidas Decl., *supra* note 15, ¶ 3. Leonidas Suppl. Decl., Victims' Petition, *supra* note 15, Anexo 35, ¶ 5.

[106] *See* Testimony of Genaro Rincón before Court, 14 March 2005 [hereinafter "Rincón Testimony"]; Rincón Decl., *supra* note 15, at 6; Tiramen Decl., *supra* note 16, ¶ 10.

denial was ratified by a July 20, 1998 decision by the *Procurador Fiscal* as well as a September 1999 letter from the JCE.[107]

Though the State disputes that the civil registrar intentionally discriminated, ample evidence shows that such discrimination is common in the Dominican Republic, and supports a strong inference of discriminatory purpose.[108] As repugnant as the actions of the civil registrar were, they were consistent with broader policy, practice, and culture in the Dominican Republic. As Profesor Martinez stated in his affidavit, the leaders of the country, the media, and "dominicanos de todos los estratos sociales,"[109] view " 'haitianos' como una masa indiferenciada, sin distinguir entre domínico-haitianos y ciudadanos haitianos, sugiriendo y afirmando a veces explícitamente que los nacidos en la República Dominicana son tan haitianos como sus padres nacidos en Haití."[110] This is clearly the inference that drives the new migration law's definition of the "in transit" exception of the Dominican constitution. The civil registrar, Mrs. Bienvendia, herself stated that she was acting pursuant to superior orders to discriminate when she denied the Victims' applications.[111] After the rejection, when advocates of the Victims sought assistance from other government officials, including the *Inspector de Migración,* (Teniente Scot) the *Procurador Fiscal*, and a reach of these officials reiterated the existence of a policy to not permit the registration of children of Haitian immigrants, and stated a general concern with the "invasion" of Haitian immigrants and the "blackening" of the Dominican Republic.[112]

This broad state policy and practice of hindering the registration of children of Haitian descent is well documented by the Commission,[113] several independent NGOs,[114] local advocates,[115] and the expert for the Commission and the Victims, Professor Martinez.[116]

The civil registrar's purposeful discrimination against Dilcia and Violeta because of their ancestry[117] clearly violates the first prong of the Court's test. Her actions fail the remainder of

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[107] Procurador Orden, *supra* note 20; Carta de 27 de septiembre, *supra* note 22.

[108] It is important to note that circumstantial evidence and the drawing of inferences take on particular significance in the context of discrimination cases, where "often racial discrimination will have to be established, if at all, as a matter of inference." *Chapman v. Simon* (1994) IRLR 273, Section 43. Evidence of "a general picture" of disadvantage, or "common knowledge" of discrimination might be enough to establish a *prima facie* case. *See EAT in London Underground v. Edwards* (No.2) IRLR 364 (1999); *Mayer v. Australian Nuclear Science and Technology Organizsation* EOC 93-285 (2003).

[109] Martínez Affidavit, *supra* note 17, ¶ 11.

[110] *Id.* ¶ 9.

[111] *See* Rincón Testimony, *supra* note 106; Rincón Decl., *supra* note 15, at 6.

[112] *See* Rincón Testimony, *supra* note 106; Rincón Decl., *supra* note 15, at 6-8.

[113] Commission Report 1999, *supra* note 36, ¶ 352.

[114] Nat'l Coalition for Haitian Rights, Beyond the Bateyes: Haitian Immigrants in the Dominican Republic 23-27 (1996) [hereinafter Beyond the Bateyes]; Victims' Petition, *supra* note 15, Anexo 17; Human Rights Watch, Illegal People: Haitians and Dominico-Haitians in the Dominican Republic 24-25 (2002); Victims' Petition, *supra* note 15, Anexo19; Nancy San Martin, *Haitians Crossing Into Dominican Republic Seeking Jobs But Finding Abuse*, MIAMI HERALD, July 20, 2001; Victims' Petition, *supra* note 15, Anexo 29.

[115] Regarding similar discriminatory actions at other civil registrars, see Rincón Decl., *supra* note 15, at 4,5 (Oficial Civil Sr. Carlos Ciriaco, Raul Bienvenida, Esperanza de Valverdy, Mao); Declaración de Christina Francisca Luis, Victims' Petition, *supra* note 15, Anexo 49, at 3; Declaración de Ramona Decena, Victims' Petition, *supra* note 15, Anexo 5, at 1-2.

[116] Martinez Affidavit, *supra* note 17, ¶¶ 8-14.

the test as well, as there can be no legitimate justification for denying registration to Dominican children simply because of their Haitian ancestry.

B. The State Birth Registration Policies Had a Discriminatory Effect on the Victims in Violation of Articles 1(1) and 24.

The State disputes the facts regarding the civil registrar's intentional discrimination, and instead argues that Ms. Bienvenida denied Dilcia's and Violeta's applications for registration because they did not present their mothers' *cédulas*, or, as argued in prior pleadings by the State, they did not fulfill a list of eleven requirements for birth registration issued by the JCE.[118] In either case, the State insists that the Dominican *cédula* of the parents is an essential requirement for registration. The *cédula* requirement (especially when combined with the ten other requirements) has had a clear discriminatory effect on Dominican born children of Haitian descent, including Dilcia and Violeta, and its application constitutes a violation of the Dominican Republic's obligations under Articles 1(1) and 24.

While facially neutral, it has been well established that *cédula* requirement has the effect of discriminating against Dominican children of Haitian descent, including the Victims, in the enjoyment of their rights.[119] The discriminatory impact of this requirement, for example, is made evident if one considers that only 5% of the approximately 500,000 to 700,000 Haitians who live in the Dominican Republic have identity documents, even though many have lived in the Dominican Republic for twenty years, thirty years or even longer.[120]

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[117] That this group was defined by a protected characteristic – ethnicity – makes the violation even more clear. Though the Convention, through Article 24, prohibits discrimination between groups based on any characteristic, Article 1(1) more specifically prohibits discrimination based on those factors listed in the Article: "race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition." The Convention is thus particularly concerned with discrimination based on, as in this case, ethnicity or nationality. American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, [hereinafter "Convention"].

[118] As discussed at length above, at trial Ms. Bienvenida insisted that no more than four requirements were applied to the girls, while numerous other representatives of the State, including the Procurador Fiscal, the JCE, and the representatives before the Commission and the Court, have repeatedly asserted that eleven requirements applied to the girls. Bienvenida Testimony, *supra* note 5.

[119] "Until now, it's been that the series of requirements that are required to register make it impossible to register a child of Haitian descent – meaning that the child's parents are Haitian. Among those requirements, the fundamental one is that the parents have *cédulas de identidad y electoral* (proper name for *cédula*). This is, of course, the most difficult requirement and the one that makes it insurmountable for us normally to register the births and declarations of birth of children of Haitian descent. Because if the parents don't have *cédulas*, the parents can't declare their children." Morel Cerda Entrevista, *supra* note 24, p. 1 at 19-27. The *cédula* requirement "creates a situation of disadvantage that tends to discriminate against one of the most disfavored sectors of the population, that of Dominican children of Haitian descent . . . ." Commission Report 1999, *supra* note 36, ¶¶ 360, 363. "[T]he regulations requiring proof of legal status had the effect of excluding Dominican-born children of Haitian ancestry from registration." Human Rights Committee, Third and fourth periodic reports: Dominican Republic, 27/04/2000, CCPR/C/DOM/99/3, (State Party Report), ¶10. *See also* Beyond the Bateyes, *supra* note 114, at 25-26.

[120] Commission Report 1999, *supra* note 36, ¶ 350; *see also*, GLENN R. SMUCKER & GERALD F. MURRAY, THE USES OF CHILDREN: A STUDY OF TRAFFICKING IN HAITIAN CHILDREN 126 (2004) [hereinafter USAID REPORT], submitted by the State to Court, Jan. 5, 2005 ("As many as half of Haitians born in the Dominican Republic have been refused *cedulas*.").

And according to the Commission, Haitians parents are less likely than Dominican parents to have *cédulas*, because "[m]any Haitians do not possess this document, either because they are not eligible, or because employers or State agents have not provided the documents to which Haitians are entitled." [121] As a result, the parental *cédula* requirement "means practically excluding all children of Haitians, even when they are born in Dominican territory."[122] Dilcia and Violeta are no exception to this discriminatory system, as both of their fathers are Haitian. The *cédula* requirement has the effect of discriminating against an ethnic group, and therefore fails the first prong of the discrimination test.

Though the distinction created by the requirements has a discriminatory effect on the basis of nationality, the State claims to have legitimate justifications for the distinction. The Dominican Republic asserts that the requirements for late registration are necessary to avoid electoral fraud, trafficking of children and falsification of identities.[123] Furthermore, the State argues that presentation of the *cédula* is an "indispensable" requirement, because without it, the State cannot determine whether the child was born to foreigners who are diplomatic representatives or "in transit," and therefore not entitled to Dominican nationality according to the Dominican constitution.[124]

The legitimacy of the Dominican Republic's reported justifications is fatuous. A legal expert on the right to nationality, Professor Packer testified that he failed to see the connection between conferral of nationality and the prevention of trafficking or electoral fraud. It is illogical that denying birth certificates to children could conceivably lessen electoral fraud. Children will not vote until they reach the age of majority, and thus cannot be falsely registered as a way of manipulating an impending election. Further, Professor Packer suggested several simple administrative measures that the Dominican Republic could adopt to prevent electoral fraud without denying nationality to Dominicans of Haitian descent, such as delaying the period between registration and voting. It is simply unacceptable for the Dominican Republic to deny nationality to individuals belonging to a certain group because the State presumes bad intent on the part of that entire category of persons.[125] Professor Packer further noted that failing to confer nationality on a large group of children actually makes children *more* vulnerable to trafficking because they lack the protection of the State, thereby violating their human rights. Though anti-trafficking and preventing electoral fraud are legitimate aims, the means for achieving them are off target and in contradiction of human rights principles.

Assuming that the State has a legitimate interest in ensuring children born to those simply passing through the country are not registered, the impact of the requirements used in this case are clearly disproportionate to those aims. The requirements therefore fail the third prong of the discrimination test as well.

As one scholar of international human rights law summarizes: "The proportionality principle may be stated as a requirement that the disadvantage or impingement on a Convention

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[121] *Id.* ¶¶ 360, 363; *see also* Martinez Affidavit, *supra* note 17, ¶¶ 28-29.
[122] Commission Report 1999, *supra* note 36, ¶¶ 360, 363.
[123] State's Response, *supra* note 5, ¶ 82.
[124] *Id.*, ¶¶ 98-99.
[125] Packer Testimony, *infra* note 129.

right suffered by the individual is not excessive in pursuit of the public interest aim in question."[126] The European Court of Human Rights further instructs that "the principle of proportionality does not merely require that the measure chosen is in principle suited for realizing the aim sought. It must also be shown that it was *necessary* . . . in order to achieve that aim."[127]

This proportionality test is especially critical where, as in this case, the rights of children are at stake. As has been established above, the states are obliged to provide a greater degree of protection to children than adults, because of their age, disadvantage and vulnerability.[128] To establish proportionality where a distinction primarily affects children, the state must therefore meet a very high burden: it must make a strong showing that the impingement of the rights of children is absolutely necessary to achieve the purported public interest aim.

Based on the foregoing, the effects of imposing such stringent requirements on children rightfully applying for birth registration are clearly disproportionate to the purported interests of the State. The *cédula* requirement prevents thousands of children from legitimately registering, yet the State has presented no evidence that the requirements are necessary to prevent falsifications, electoral fraud,[129] or the registration of children whose parents are "in transit"

The disproportionality of the requirements to the justifications becomes most clear when considering all of the less discriminatory alternatives the State could use to achieve the same ends.[130] The State could request other documents that prove the identity of the parents, besides the *cédula*. This way the State could protect children from abuse and facilitate the registration of Dominican-Haitian children. Any document showing that a parent lives or works in a *batey*, for a certain length of time, would be sufficient to prove that they are not residing in the country for diplomatic purposes, or are "in transit." As Professor Packer testified at trial, all that should be required is some proof of the child's birth in the country, and some proof of the relationship

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[126] EQUALITY AND NON-DISCRIMINATION, *supra* note 92, at 48 (citing *National Union of Belgian Police v. Belgium*, Judgment of October 27, 1975, Eur. Ct. H.R., ¶ 49 ("disadvantage suffered by the applicant is excessive in relation to the legitimate aim pursued.")).

[127] *Karner v. Austria*, Judgment of July 24, 2003, Eur. Ct. H.R. 40016/98, ¶ 41 (emphasis added).

[128] Convention, *supra* note 117, art. 19; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador," art. 16, O.A.S. Treaty Series No. 69 (1988), entered into force Nov. 16, 1999; International Covenant on Civil and Political Rights, art. 24, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976, [hereinafter "ICCPR"]; Convention on the Rights of the Child, art. 3, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2 1990, [hereinafter "CRC"]; U.N. Human Rights Committee, General comment No. 17: Article 24 (Rights of the child), Thirty-fifth session (1989), at 144 ("Consequently, the implementation of this provision entails the adoption of special measures to protect children, in addition to the measures that States are required to take under article 2 to ensure that everyone enjoys the rights provided for in the Covenant.").

[129] Furthermore, according to the testimony of Professor Packer, it is simply impermissible to limit the right to nationality of children because of a purported concern with trafficking or electoral fraud. *See* Testimony of Frederick John Packer before Court, 15 March 2005 [hereinafter "Packer Testimony"]; *see also infra* note 168 and accompanying text.

[130] When determining proportionality, the Court should consider the existence of less discriminatory alternatives which might achieve the same legitimate state purpose. *Inze v. Austria*, October 28, 2987, Eur. Ct. H.R. (Ser. A) No. 126, ¶ 44 ("the aim of the legislation in question could also have been achieved by applying criteria other than that based on birth in or out of wedlock.").

between the parent and the child. The former typically consists of a birth certificate *or* a baptismal certificate *or* a certificate from a midwife or clinic. The latter typically consists of any sort of common identification document.

III. THE STATE VIOLATED DILCIA'S AND VIOLETA'S RIGHT TO NATIONALITY UNDER ARTICLES 19 AND 20.

The Dominican Republic violated Dilcia's and Violeta's right to nationality by refusing to register their births on Dominican territory in compliance with the constitutional principle of *jus soli*. Article 20 provides that:

> 1. Every person has the right to a nationality.
>
> 2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.
>
> 3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

The Inter-American Court has acknowledged the fundamental importance of the right to nationality, declaring that nationality is "an inherent right of all human beings," and, further, "[n]ot only is nationality the basic requirement of the exercise of political rights, it also has important bearing on the individual's legal capacity."[131] The Commission has described nationality as "one of the most important rights of man, after the right to life itself, because all other prerogative guarantees and benefits man derives from his membership in a political and social community – the State – stem from or are supported by this right."[132]

The Dominican Republic violated the Victims' rights under all three sections of Article 20. The State violated 20(1) and 20(3) by depriving the girls of Dominican nationality legally conferred to them at birth under the *jus soli* principle established by the Dominican constitution. Assuming *arguendo* that the girls were not automatically Dominican nationals by birth, the Dominican State also violated their rights by rendering them stateless in violation of Article 20(1) and 20(2) which includes a residual *jus soli* principle. In addition, the Dominican State violated the victims' right under international human rights law – and applied in this case through article 19 – to a residual *jus soli* Dominican nationality for otherwise stateless persons. As Professor Packer emphasized, this violation is ongoing. The Dominican Republic violated the girls' right to nationality when it prevented them from registering. The violation continues because the girls' nationality is not secure; the State issued their registration documents in contravention of the law and they are subject to revocation.[133]

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[131] *Proposed Amendments Advisory Opinion*, *supra* note 91, ¶ 32.
[132] *See* Third Report on the Situation of Human Rights in Chile, ICHR OEA/Ser.L/V/II.40 Doc. 10, 11 February 1977, Chapter IX: "Right to Nationality" ¶ 10.
[133] Packer Testimony, *supra* note 129.

A. The State Arbitrarily Denied Dilcia's and Violeta's Rights to Dominican Nationality Pursuant to Articles 20(3) and 20(1).

As Professor Packer testified, states exercise their sovereign rights in choosing their method of conferring nationality, but this method must be in accordance with international law.[134] Under traditional international law, questions of nationality were part of the reserved domain of the state.[135] Nationality by birth was determined either by the principle of *jus soli* or *jus sanguinis*, both of which evidenced a connection between the individual and the state.[136] States choose the means by which they administratively confer nationality on those who qualify under either principle.[137] In this case, the Dominican Republic chose to utilize a registration system to confer nationality via the *jus soli* principle. However, once a state chooses a system, the state cannot arbitrarily use the system to discriminatorily deny nationality to certain groups. Yet, this is just what the Dominican Republic did by conditioning the grant of nationality on the legal status of the parent.

International law also imposes specific duties on states regarding the conferral of nationality on children. As Professor Packer testified, a state's "duty is to secure enjoyment of rights as soon as possible and in the best interest of child."[138] Procedures should comply with international norms by requiring a state to confer nationality on a child immediately or as soon as possible after birth.[139] States cannot adopt procedures to confer nationality which would undermine their international obligations and prevent the full enjoyment of nationality rights.[140] The best interests of the child must be at the heart of all procedures.[141]

Professor Packer emphasized that to meet international obligations states should facilitate parental registration of their children, rather than create obstacles to registration. States should, therefore, ensure that their approach to the acquisition of nationality is fully compatible with contemporary rules and principles of international law as well as with additional treaty obligations. Further the State must stipulate that the process of nationality acquisition is straightforward and non-discriminatory.[142] These principles are enshrined in Article 20(3)'s prohibition on arbitrary denial of nationality.

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[134] *Id.*
[135] *See, e.g.,* 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, 179 *League of Nations Treaty Series* 89, 99, art.1("It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.").
[136] Packer Testimony, *supra* note 129.
[137] *Id.*
[138] *Id..*
[139] CRC, *supra* note 128, art. 7(2); ICCPR, *supra* note 128, art. 24.
[140] Packer Testimony, *supra* note 129.
[141] CRC, *supra* note 128, art. 2; Packer Testimony, *supra* note 129.
[142] Carol Batchelor, *The International Legal Framework Concerning Statelessness: A Case Study of the Dominican Republic and the Republic of Haiti*, INDIAN SOCIETY OF INTERNATIONAL LAW: YEARBOOK OF INT'L HUMANITARIAN & REFUGEE LAW, Vol. IV, (2004), ¶ 15 [hereinafter *International Legal Framework*].

1. The State Arbitrarily Denied the Victims' Their Right to Nationality by Refusing to Register them.

Adopting the principle of *jus soli,* the Dominican constitution and domestic laws provide that all individuals born in the Dominican Republic are Dominican unless their parents are diplomats or are "in transit." In the case of Dilcia and Violeta, even though their mothers had *cédulas*, the evidence is overwhelming that Ms. Bienvenidas disregarded these documents and asserted, with impunity, that the mothers did not have *cédula*s. The Civil Registar's position was subsequently ratified and enforced by the *Procurador Fiscal* and the *Junta Electoral Central.*

2. The Regulations Adopted to Implement the Birth Registration System Constitute Administrative Obstacles to Conferral of Nationality and Contradict the Principle of *Jus Soli.*

The regulations adopted by the JCE also impede a significant number of individuals, including the victims, from acquiring the right to Dominican nationality – even though they were born in the country and their parents are neither diplomats nor in transit. At the time the Victims appealed the Registrar's denial of their application, the JCE imposed eleven requirements on late birth registrations.[143] Most Dominicans of Haitian descent could not meet these requirements both because they are costly and because they demand certain proof – such as the declarations of three witnesses who are over the age of 50, who can sign and have *cédulas* – which simply may not exist.[144] Further, most of them do not bear any strict relation to the right to nationality, for which one should have only to prove birth in the country.

The number of registration requirements is also disproportionate to the need for proving birth in the Dominican Republic. Professor Packer concluded in his testimony that he had never seen a registration system like the Dominican Republic's which requires eleven conjunctive requirements. A single document is normally sufficient to prove birth in the country and identity, the only requirements necessary to confer nationality in a *jus soli* country. Professor Packer stated that to prove a child's identity, states typically seek either a birth certificate *or* a baptismal certificate *or* a certificate from a midwife or hospital; these requirements should not be conjunctive. Additionally, since only the fact that a child is born on the territory of the state is required to gain nationality in a *jus soli* system, the legal status of the parent is irrelevant. Parents should only need to prove asserted relationship between themselves and their children using any sort of common identification document such as an identification card or driver's license. Other requirements are extraneous and disproportionate to the object of the requirements.[145]

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[143] *See* Carta de Manuel Ramón Morel Cerda a Servio Tulio Castaños Guzmán, Embajador, de fecha 27 de septiembre de 1999, Victims' Petition, *supra* note 15, Anexo 47; Junta central Electoral, Requisitos para la Declaración Tardía de Nacimientos, Victims' Petition, *surpa* note 15, Anexo 46; *see also* Procurador Orden, *supra* note 20.

[144] *See* Junta Central Electoral, Requisitos para la Declaración Tardía de Nacimientos, Victims' Petition, *surpa* note 15, Anexo 46.

[145] Packer Testimony, *supra* note 129.

B. The State Denied Dilcia's and Violeta's Right to Nationality under the Jus Soli Principle Codified in Article 20(2).

1. International Law Limits State Discretion in Conferral of Nationality.

International law limits state discretion to confer nationality on two grounds – avoiding statelessness and respecting the protection of human rights. International law also obligates states to assure a heightened standard of protection when children's rights are involved. Article 19 and other international instruments articulate this heightened standard for children's nationality rights.[146] Article 20(2) reiterates this standard by guaranteeing the right to a nationality, through operation of law or under residual *jus soli*.

Contemporary international law imposes on the state a duty to prevent the creation of statelessness and take measures to reduce it. Statelessness is thought of as "the antithesis of legal identity in a world construct of states…stateless persons fall outside the normal legal regime. This legal vacuum translates into a lack of personal identity, belonging, and sense of place."[147] Statelessness can be either *de jure* or *de facto*. Persons are considered *de jure* stateless if they are not granted a nationality immediately under operation of law of any country.[148] They are deemed *de facto* stateless when they have a nationality, but it is ineffective.[149] Dilcia and Violeta fall under both categories. The Dominican Republic made the girls *de jure* stateless by denying them their *Actas* – and therefore their nationality – for years, through application of discriminatory registration requirements. The State rendered the girls *de facto* stateless because their *Actas* were issued illegally and because the State considers them Haitian citizens, a citizenship they cannot establish and which is therefore ineffective.[150]

International treaties on statelessness afford special protections to children because of their vulnerable status. One trend in international law is the residual *jus soli* principle applicable to otherwise stateless people and which has a special focus on children. This principle is contained in Article 20(2) of the Convention: "every person has a right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality." Otherwise stateless children are additionally protected by other international instruments. Article 7(2) of the CRC, for example, imposes a residual *jus soli* for otherwise stateless children by providing: "States Parties shall ensure the implementation of [the right to nationality] in

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[146] The ICCPR and the CRC mandate that children should have the right to nationality. ICCPR, *supra* note 128, art. 24; CRC, *supra* note 128, art. 7

[147] *International Legal Framework*, *supra* note 142, ¶ 6.

[148] Carol A. Batchelor, *Statelessness and the Problem of Resolving Nationality Status*, 10 INT'L J. REFUGEE L. 156, 171 (1998).

[149] *Id.* at 172.

[150] *See* USAID REPORT, *supra* note 120, at 18 (Denial of citizenship "creates an anomalous legal status for Dominico-Haitian children – invariably classified as Haitian even if they have a Dominican parent…[t]his anomalous legal situation…relegates Haitians to a state of permanent illegality and renders them effectively stateless.").

particular where the child would otherwise be stateless."[151] Thus, State discretion in determining nationality is constrained by the state's duty to avoid statelessness, especially with children.[152]

a. Dominican Nationality is the only accessible and effective nationality for Dilcia and Violeta.

In determining matters of nationality, contemporary international law grants wide discretion to the state, but stresses the need for a "genuine connection" between the individual and the state. In the *Nottebaum* case, the International Court of Justice (ICJ) determined that nationality may be "a legal bond having as its basis a social fact of attachment"[153] reflecting a "real and effective nationality."[154] This Court has also emphasized this tangible link in stating that "nationality no longer depends on the fortuity of birth in a given territory or on parents having that nationality." Determination of an individual's nationality therefore has its basis not only in an individual's place of birth or ancestry, but also in his or her ties to a specific state.

There is a two prong test for determining the genuine link between a person and a state. The primary prong is effectiveness and the secondary is accessibility. Effectiveness refers to the breadth and depth of the genuine link between an individual and a particular state. It is defined as the relationship between a state and an individual with a specific focus on protection. An effective state relationship is necessary for other states to rely upon when determining which country has control over a particular individual, thereby facilitating order in international relations. Furthermore, an effective tie is essential for an individual to access the rights that come with nationality, including state protection. [155] The state with the closest connection to the individual is the state with the most effective link. As determined in *Nottebaum,* attachment between an individual and a state can be shown by numerous factors asserting close factual connections such as residency, assets, and material well being. [156]

Professor Packer's testimony and the *amicus* brief submitted by The Themis Foundation address the idea of an "active link" between a person and a state as another aspect of effective nationality.[157] The concept behind an active link is that "an individual, by his or her actions and

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[151] CRC, *supra* note 128, art. 7(2); *see also* African Charter on the Rights and Welfare of a Child, art. 6, OAU Doc.CAB/Leg/153, entered into force Nov. 29, 1999.

[152] The European Convention on Nationality, for example, codifies conservative customs of international law. It imposes a duty on states to give nationality to otherwise stateless children within no more than five years of residency on the territory of a state party to the convention. Article 6(2) states: "Each State Party shall provide in its internal law for its nationality to be acquired by children born on its territory who do not acquire at birth another nationality. Such nationality shall be granted … subsequently, to children who remained stateless, upon an application…subject to the lawful and habitual residence on its territory for a period not exceeding five years immediately preceding the lodging of the application." European Convention on Nationality, art. 6, ETS No. 166, entered into force Jan. 3, 2000.

[153] *Nottebaum case* (*Lichtenstein v. Guatemala*), Permanent International Court of Justice, Reports 1955, at 23. [hereinafter *Nottebaum Case*]

[154] *Id.* at 22.

[155] Packer Testimony, *supra* note 129.

[156] In *Nottebaum* the court found relevant "actual connections" such as "settled abode," "prolonged residence," "visits," "economic interest," "activities exercised or to be exercised," and payment of taxes. *Nottebaum Case, supra* note 153 at 25.

[157] The Themis Foundation, Amicus Brief; dated March 31, 2005 at 5 *citing Canevaro* case (Italy v. Peru), 1912, 11 R.I.A.A. 397. [hereinafter "Themis Amicus Brief"]; Packer Testimony, *supra* note 129.

with the consent and cooperation of the state, draws upon and benefits from the state thereby establishing and demonstrating a link which may be said to constitute real and effective nationality."[158] Consequently, if an individual has two possible nationalities, the nationality of the state with which he or she has an effective relationship (by birth and/or social attachment) supersedes the "theoretical" nationality, i.e. the nationality of the state where there is no active link.[159]

The second prong of the genuine and effective link test for nationality is accessibility. In order for individuals to avail themselves of rights and protection that nationality makes available to them they must be able to access that nationality. To this end, a state may not create administrative or practical obstacles which make its nationality difficult to access.[160]

Dilcia and Violeta do not consider themselves Haitian. They do, by contrast, feel "Dominican" and are proud of being Dominican.[161] They are part of the Dominican community, active in their churches and bateyes, and Spanish is their mother tongue.[162] They were born and have lived their entire lives in the Dominican Republic, therefore all of their social facts of attachment point to a genuine and effective link to the Dominican Republic. The composite of Dilcia and Violeta's lives objectively and subjectively demonstrate that the *only* state to which they enjoy effective and accessible links is the Dominican Republic.

The deprival of Dominican nationality has left Dilcia and Violeta stateless in violation of Article 20(2) of the Convention. Dilcia and Violeta do not have nationality *ex lege* in the Dominican Republic and are left stateless in violation of the Convention as well as the CRC, International Covenant on Civil and Political Rights ("ICCPR"), the Universal Declaration of Human Rights, and other international instruments. As the territorial state, the Dominican Republic must take measures to grant Victims Dominican nationality under the residual *jus soli* principle regardless of whether or not the State considers them Dominican citizens by birth.

b. Dilcia and Violeta are not Haitian nationals.

The Dominican Republic argued at trial that the Victims have a right to Haitian nationality, and thus the State never deprived them of a nationality.[163] This argument, however, fails because Haitian nationality is both ineffective and inaccessible for Dilcia and Violeta.

In theory the Haitian Constitution[164] extends nationality to children born to a Haitian national. Article 11 of this document reads in relevant part:

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[158] Themis Amicus Brief, *supra* note 157, ¶ 10.
[159] *Id.* ¶ 13; Packer Testimony, *supra* note 129.
[160] Themis Amicus Brief, *supra* note 157, ¶ 15
[161] Munczek Testimony, *supra* note 30.
[162] "No deseo ser nacional de Haiti. Soy Dominicana. Mi iglesia donde voy todos los días está en la República Dominicana, cerca de mi casa. Me gusta la comida de aquí, mas que nada el moro. Todos mis amigos y familia viven en la República Dominicana." Violeta Suppl. Decl., *supra* note 27. "No conozco nadie allá porque no he ido nunca. Dilcia no sabe nada de Haiti y allá no hay nadie que la puede cuidar." Leonidas Decl., *supra* note 15, ¶ 5.
[163] State Closing Argument, March 15, 2005.
[164] The Constitution of the Republic of Haiti, January 1987, Title II, art. 11.

> Any person born of a Haitian father or Haitian mother who are themselves native-born Haitians and have never renounced their nationality possesses Haitian nationality at the time of birth.

Dilcia's and Violeta's mothers are Dominican citizens and are not Haitian nationals. Both of their fathers are Haitian[165] but neither of the girls nor their mothers have any contact with them nor do they know how to get in touch with them if the need arose.[166] Consequently, neither girl can prove that she has a native-born Haitian father who never renounced his nationality. As a result, Dilcia and Violeta cannot access Haitian citizenship and enjoy the rights and protections provided by it.

In addition to being inaccessible, Haitian citizenship is ineffective for both girls. Dilcia's and Violeta's mothers were both born in the Dominican Republic. Dilcia and Violeta have never been to Haiti, they know nobody in that country, and they feel no affinity for or ties to Haiti.[167] As Dr. Munzcek testified, for Violeta "the idea of being deported to Haiti is like being deported to outer space."[168] It is not surprising that the girls, whose families have resided in the Dominican Republic for two generations, have no contact or linkages with Haiti. Haitian nationality is simply ineffective.

2. The State Violated Dilcia's and Violeta's Human Rights as Children under Article 19 by Failing to Confer on Them Nationality.

The duty to respect human rights also acts as a limit on state discretion in providing nationality.[169] Nationality is the right to have rights and, as a result, is the basis for the protection of other human rights. The right to nationality has been characterized by the individual need for protection by ensuring that the individual's legal rights are guarded by the state. Due to children's vulnerability, children's human rights and nationality are specially protected as illustrated in the Inter-American system by Article 19. International conventions and customary international law have developed norms that guarantee a child has a right to a

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[165] Violeta Decl., *supra* note 27, ¶ 1 ("Mi padre es Delima Richard y nació en Haiti."); Violeta Suppl. Decl., *supra* note 27, ¶ 1. Leonidas Decl., *supra* note 15, ¶ 3 ("Mi segunda hija es Dilcia...[s]u padre es Federico y creo que nació en Haiti.").

[166] Violeta Suppl. Decl., *supra* note 27, ¶ 1 ("Mi padre fue cuando era bebé y no tengo contacto con él."); Leonidas Decl., *supra* note 15, ¶ 3 ("No se donde esta [el padre de Dilcia] ahora.").

[167] *See* Violeta Suppl. Decl., *supra* note 27, ¶ 10 ("No deseo ser nacional de Haiti. Soy Dominicana. Mi iglesia donde voy todos los días está en la República Dominicana, cerca de mi casa. Me gusta la comida de aquí, mas que nada el moro. Todos mis amigos y familia viven en la República Dominicana."). Leonidas Decl., *supra* note 15, ¶ 5 ("No conozco nadie allá porque no he ido nunca. Dilcia no sabe nada de Haiti y allá no hay nadie que la puede cuidar."). Dr. Munzcek also noted that "Sometimes they would say 'repatriado', but [for Violeta Haiti is] not her country. The only country she knows is the Dominican Republic." Munczek Testimony, *supra* note 30.

[168] Munczek Testimony, *supra* note 30.

[169] The OAS was the first to recognize nationality as a human right in Article XIX of the American Declaration providing: "Every person is a right to the nationality to which is entitled by law and to change it, if he so wishes...." American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, *adopted by* the Ninth International Conference of American States (1948), *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II.82 doc.6 rev.1 at 17 (1992), Art. XXII. This was followed by the Article 15 of the Universal Declaration of Human Rights which states that "1. Everyone has the right to nationality, 2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality." Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948).

nationality, and specifically the right to the nationality of the state in which they were born if the child would be otherwise stateless. This is intended to protect the human rights of vulnerable children in their formative years.[170] Nationality guarantees for children are crucial to avoiding statelessness and determining a nationality that is capable of providing state protection in the daily life of the child.[171]

The Dominican Republic argues that its nationality laws are legitimately restrictive because it is concerned about electoral fraud and trafficking of children. This argument is irrelevant. Article 19 demands that regulations concerning children be written with the best interests of the child as a primary consideration.[172] Under the CRC, if a child is deprived of an aspect of her identity, such as nationality, the state has a positive "duty to provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity."[173] The state should assist in, rather than impede, registration. The only permissible requirements are those aimed at proving birth in national territory to parents not in transit, and that do not, through their demands, exclude children who have a right to Dominican nationality from acquiring that right.

Clearly, the purpose of the eleven requirements was to encumber and not facilitate Dilcia and Violeta's registration. In fact, Dilcia and Violeta were never able to fulfill those requirements. The Dominican birth registration is so burdensome that the State had to circumvent its own procedures in order to issue Dilcia and Violeta their *Actas*.

V. THE STATE VIOLATED DILCIA AND VIOLETA'S RIGHTS TO DUE PROCESS AND JUDICIAL PROTECTION UNDER ARTICLES 8, 19 AND 25.

In our original pleading before the Court, we argued that the absence of a adequate and effective remedy to appeal the decision to deny Dilcia and Violeta their birth certificates violates articles 8 and 25 of the Convention. At the time of the denial, in theory, there existed two avenues to appeal decisions issued by a civil registrar. However, the procedures are contradictory and neither one provides a procedure which complies with article 8 of the Convention.

On the one hand Ley 659 – which can only be described as confusing and inadequate – is so unclear that not even Ms. Bienvenida could explain the procedure it establishes during her testimony before the Court. What is clear however is that Ley 659 did not establish a procedure by which Dilcia and Violeta could appeal the decisions before a competent judge or tribunal. Under Ley 659, only the *Procurador Fiscal* can intiate such an action.[174] Given that he failed to do so, Dilcia and Violeta were denied their day in Court.

On the other hand, the State insisted that Dilcia and Violeta should have presented an appeal before the JCE. This body does not meet the standards established by article 8. The JCE

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[170] Packer Testimony, *supra* note 129.
[171] *International Legal Framework*, supra note 142, ¶ 21.
[172] *See* section of this brief entitled: "Arguments on the Merits," section (I), above.
[173] CRC, *supra* note 128, art. 8.
[174] *Id.*

is administrative not a judicial body. Its decisions are final and its procedures explicitly prohibit appeals. The appeals process for a negative decision on registration before the JCE is not regulated by any published guidelines or procedures and does not protect due process guarantees. Exhausting this remedy clearly would have been futile since there was no "remedy" to exhaust Moreover, the JCE already issued its opinion in this case. In a letter submitted on September 27, 1999 by the State to the Commission, the President of the JCE, asserts that Dilcia's and Violeta's applications for registration were inadmissible and attached a list of the eleven requirements the two girls had to fulfill.[175]

In 1997, Dilcia and Violeta did not have access to a summary, rapid and effective mechanism to appeal the decision of a civil registrat in accordance with article 25 of the Convention. This continues to be true to this day.

In this pleading we will focus on two issues. First, we will argue that the Court has firmly established that, under Article 19, the rights to due process and judicial protection are more stringent when children are implicated. Second, we will rebut the State's argument that the new appellate procedures created by the State since 2003 are effective.

A. The New Appeals Processes Do Not Satisfy the Right to Due Process for Children.

Under Article 8 of the Convention,

> [e]very 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...determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

The Court has established that, read through Article 19, Article 8 means that children require special procedural safeguards.[176] Drawing on the CRC to interpret Article 8, the Court has emphasized that "the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child."[177]

Dilcia and Violeta were not afforded this opportunity under the old legislation and the administrative review established by new JCE resolution precludes petitioners from having voice in the administrative proceedings that deny them their birth certificates. When a civil registrar denies a birth registration, this State official must request the plenary of the JCE to review the case.[178] Not only does this instruction fail to stipulate criteria or procedures for the plenary to follow on reviewing decisions by civil registrars, it gives no role whatsoever to the petitioners. Further, the instruction manual forbids applicants from being represented by counsel unless they

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[175] Carta de 27 de septiembre, *supra* note 22.
[176] *See generally Legal Status*, *supra* note 1.
[177] *Legal Status*, *supra* note 1, at 99.
[178] Manual o Instructivo para la Aplicación de la Resolución 07/2003 de Fecha 17 de Noviembre del 2003 de la Junta Central Electoral Relativa a la Instrumentación de Declaraciones Tardías de Personas Mayores de Dieciséis (16) Años de Edad, ¶ 2 *in* REDH Amicus Brief, *supra* note 34, Anexo H.

first obtain approval from the JCE.[179] Clearly, this does not qualify as providing an opportunity for a child to be heard, and does not respect the child's best interest. Finally, no special procedures are contemplated for children, nor does the resolution mention the Code for Minors or the New Code for Boys, Girls and Adolescents.

B. The New Appeals Processes Do Not Satisfy the Right to Judicial Protection for Children.

Under Article 25,

> [E]veryone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention.

Were the State to rescind the Victims' illegally granted documents today, the Victims would find that they still did not have access to a simple and prompt recourse. Judge Medina has emphasized the difference between Article 8's "reasonable time" requirement and Article 25's "simple and prompt" requirement. A "reasonable time" period "puede fácilmente superar un año en términos del artículo 8."[180] Article 25, by contrast, "requiere no un plazo razonable, sino rapidez, es decir, probablemente su resolución en términos de días."[181] The demand for speedy justice is particularly stringent in cases where a child's fundamental rights hang in the balance. Indeed, the CRC – which this Court uses as a guide to delineating Article 19 protections – imposes a duty on the state to assist a child to "speedily" reestablish his or her identity when it is threatened.[182]

As the Victims' efforts to have their case heard demonstrates, there is no such simple and prompt recourse in Dominican Republic. Both the writs of *amparo* and *inconstitucionalidad* can take over two years to reach final resolution.[183] When a child's very ability to study or participate in society as a legal person are at stake, this is simply not fast enough.

VI. THE STATE VIOLATED DILCIA AND VIOLETA'S RIGHT TO JURIDICAL PERSONALITY UNDER ARTICLES 3 AND 19.

A. Under Article 3 the State Has a Duty to Register Children Born in Its Territory.

Article 3 of the Convention provides that "[e]very person has the right to recognition as a person before the law." The Commission has established that a violation of Article 3 occurs

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[179] *Id.* at ¶ 16.
[180] *See Gómez Paquiyauri*, *supra* note 1, at ¶ 3 (Judge Cecilia Medina, concurring); *see also Caso 19 Comerciantes v. Colombia,* Judgment of July 5, 2004, Inter-Am. Ct. H.R. (Ser. C) [hereinafter *19 Comerciantes*] No. 109, at ¶ 3 (Judge Cecilia Medina, dissenting in part).
[181] *See Gómez Paquiyauri*, *supra* note 1, at ¶ 3 (Judge Cecilia Medina, concurring); *see also 19 Comerciantes*, *supra* note 180, at ¶ 3 (Judge Cecilia Medina, dissenting in part).
[182] CRC, *supra* note 128, art. 8.
[183] *See* Victims' Response to Preliminary Exceptions, *supra* note 61, at 6-7.

when state acts constitute "a negation of the proper existence of the victim as a human being endowed with a juridical personality,"[184] thus placing them "absolutely outside the reach of the law,[185] or "outside the law,"[186] excluded "from the legal order and state institutionalism."[187]

Through this case the Court has the opportunity to develop the doctrine of Article 3 in the context of a child's right to juridical personality. The Convention affords a heightened degree of protection for the rights of children. Thus, in cases like this one, Article 3 must be read in light of Article 19's demand that children are entitled to special protection of their rights, and that their best interests must be given priority.

While the guarantees of Article 3 have been applied in the Inter-American system only in cases of forced disappearance, other state acts can remove a person from the reach of the law. Indeed, no other state abuse, beyond forced disappearance, so well follows the above-described pattern of legal exclusion as the denial of the birth registration of a person in his or her country of origin. In the Dominican Republic as throughout the world, the birth certificate is the legal document that acts as official proof of name and identity.[188] It is necessary to assuring a legal identity and to assuring the exercise of substantive rights guaranteed by the Convention.[189] Without this official acknowledgement of legal status, a person is completely "excluded from the legal order and state institutionality."

Birth registration, in other words, is a prerequisite to legal identity, and therefore to juridical personality. Its denial amounts to a violation of Article 3 and thus Article 3 encompasses within it the right to birth registration. This notion is strongly supported by the international jurisprudence on the rights of the child. The CRC and the ICCPR both expressly declare that children have a right to birth registration. Indeed, so strongly is the right to

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[184] CIDH, *Informe No. 53/96, Caso 8074*; *Informe No. 54/96, Caso 8075*; *Informe No. 55/96, Caso 8076*; *Informe No. 56/96, Caso 9120*, *in* INFORME ANUAL DE LA COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS 1996, at 382, 394, 406, 418, OEA/Ser.L/V/II.95, Doc. 7 rev. (1997); CIDH, *Anetro Castillo y Otros, Informe No. 51/99, Casos 10.471, 10.955, 11.014, 11.066, 11.067, 11.070, 11.163* (Perú), April 13, 1999, *en* INFORME ANUAL DE LA COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS 1998, at 823, ¶ 117, OEA/Ser.L/V/II.102, Doc. 6 rev. (1999) [hereinafter CIDH INFORME ANUAL 1998]; CIDH, *Informe No. 52/99, Casos 10.544, 10.745, 11.098, Raúl Zevallos Loayza y Otros* (Perú), April 13, 1999, *in* CIDH INFORME ANUAL 1998, *supra*, at 857, ¶ 93.

[185] CIDH, *Informe No. 1/97, Caso 10.258, Manuel García Franco* (Ecuador), *in* INFORME ANUAL DE LA COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, at 551, ¶ 83.f [hereinafter CIDH INFORME ANUAL 1997].

[186] CIDH, *Informe No. 11/98, Caso 10.606, Samuel de la Cruz Gómez* (Guate.), *in* CIDH INFORME ANUAL 1997, *supra* note 185, at 619.

[187] CIDH, *Informe No. 51/99, Casos 10.471, 10.955, 11.014, 11.066, 11.067, 11.070, 11.163*; *Informe No. 52/99, Casos 10.544, 10.745, 11.098*; *Informe No. 53/99, Casos 10.551, 10.803, 10.821, 10.906, 11.180, 11.322; Informe No. 54/99, Casos 10.807, 10.808, 10.809, 10.810, 10.879, 11.037; Informe No. 55/99, Casos 10.815, 10.905, 10.981, 10.995, 11.042, 11.136; Informe No. 15/99, Casos 10.824, 11.044, 11.124, 11.125, 11.175; Informe No. 57/99, Casos 10.827, 10.984* (Perú) April 13, 1999, *in* CIDH INFORME ANUAL 1998, *supra* note 184.

[188] Cód. Civ., *supra* note 102, art. 9. The birth certificate is an official document that proves Dominican nationality, and satisfies nationality requirements in the scholarly, employment and educational realms.

[189] *Observaciones Finales del Comité de Derechos del Niño: Nicaragua*: CRC/C/15/Add. 36 (Novena Sesión, 1995), ¶ 16.

registration protected by the international law of the child, that it places the burden of fulfilling this right on the state.[190] CRC Article 7 provides:

> 1. The child shall be registered immediately after birth…
>
> 2. *States Parties shall ensure the implementation of these rights* in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Though closely linked to the right to nationality, the right to birth registration stands as a separate right under the Convention, as under international law. While the Dominican Republic tends to conflate the two, it is important to analyze them distinctly. As the nationality section noted, registration is the administrative means the Dominican Republic has chosen to confer nationality.

B. By Denying Them Birth Registration, the State Violated Dilcia's and Violeta's Rights Under Articles 3 and 19.

By denying Dilcia and Violeta's *Actas* for years, the Dominican Republic violated their right to registration, and thus to juridical personality. Like many unregistered children, Dilcia and Violeta lived in a state of legal limbo.[191] In September 2001, the State took the extraordinary and extrajudicial step of registering Dilcia and Violeta. As their documents have not been legally granted, however, Dilcia and Violeta's right to registration and juridical personality have still not been secured.

The State argues that the Victims' undocumented status is their own fault. They simply failed to comply with the registration system created by the State. Under international law, the state has a duty to register children. It cannot elude this duty by placing impediments to registration and then argue that the onus is on the children to overcome these impediments. As the Themis Foundation amicus brief states "administrative or other requirements which would be impossible to perform or substantially burdensome and in fact not necessary must be considered unreasonable and impermissible."[192] The onus lies with the State, not the Victims, to create a system that fulfills the promise of registration to those born in national territory. The parents of the Victims repeatedly tried to register their children, even presenting the documents that they

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[190] For example, article 24(2) of the ICCPR and article 7(1) of the CRC assert that "the child shall be registered immediately after birth. . . ." *See* ICCPR, *supra* note 128; CRC, *supra* note 128; s*ee generally,* SHARON DETRICK, A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD 143-46 (1999).

[191] The Commission has expressed serious concern regarding the Dominican Republic's denial of registration to Dominican children of Haitian descent, providing that denial of registration is also a denial of legal status. This situation of permanent illegality places children absolutely outside the reach of the law. "In consequence, many children of Haitian origin have their fundamental rights denied, such as the nationality of the country of birth, access to health and to education." *See* Commission Report 1999, *supra* note 36, ¶ 350-355. According to one study: "65% of the residents of the bateyes are Dominico-Haitians who live in a state of 'illegality'…. These individuals cannot go to school, legally marry, procure decent employment, [or] travel." Beyond the Bateyes, supra note 114, at 25-26; Martinez Affidavit, *supra* note 17, ¶¶ 49-58 (children without *cédulas* do not have, among other things, freedom of internal mobility, education, health care).

[192] Themis Foundation, *supra* note 157, at ¶ 57; *see also,* Packer Testimony, *supra* note 129.

had been led to believe satisfied all prerequisites. The State's attempt to shift the burden to the mothers for its own discriminatory policies must be rejected outright and the State must be held liable for its failure to register the girls.

VII. THE STATE VIOLATED VIOLETA'S RIGHT TO EDUCATION UNDER ARTICLES 26 AND 19.

In her amicus brief to this Honorable Court, former U.N. Special Rapporteur on the Right to Education Katerina Tomasevski stated that the right to education "straddles the division of human rights into civil and political, on one hand, and economic, social cultural, on the other hand, embodying them all."[193] In order to fully protect the right to education in all its permutations, both Articles 19 and 26 should be applied to this case.

A. Article 19 Protects the Right to a Free, Compulsory Primary Education That Is Accessible (Including Nondiscrimination and Material Accessibility) and Acceptable.

In a recent Advisory Opinion, this Court concluded that the right to education figures specifically within the measures of special protection that Article 19 requires of the state.

> It should be highlighted that the right to education, which contributes to the possibility of enjoying a dignified life and to prevent unfavorable situations for the minor and for society itself, stands out among the special measures of protection for children and among the rights recognized for them in Article 19 of the American Convention.[194]

Thus, the Dominican Republic's denial of Dilcia's and Violeta's right to education should be viewed through the heightened standard of Article 19.

In order to clarify the content of the right to education, Professor Tomasevski has developed an analytical framework capturing the necessary and relevant features of the right to education known as the "4-A" scheme.[195] Adopting this model, the U.N. Committee on Economic, Social and Cultural Rights has found that the right to education encompasses four essential elements: availability, accessibility, acceptability, and adaptability.[196] This "4-A's" model is consistent with the right to education enshrined in the CRC and is the framework we urge the Court to adopt.[197]

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[193] Katerina Tomasevski, Amicus Brief, *Obligations of the state regarding the right to free and compulsory education of all school age children*; dated March 6, 2005 at 8. [hereinafter "Tomasevski Amicus Brief"].
[194] *Legal Status*, *supra* note 1, ¶ 84 (emphasis added); *see also id.*, ¶ 86 ("In brief, education and care for the health of children require various measures of protection and are the key pillars to ensure enjoyment of a decent life by the children, who in view of their immaturity and vulnerability often lack adequate means to effectively defend their rights."); *id.*, ¶ 88 ("it is mainly through education that the vulnerability of children is gradually overcome.")
[195] Tomasevski Amicus Brief, *supra* note 193, at 4.
[196] *See, for example,* General Comment No. 13, of November 15, 1999, *The Right to Education, (Art. 13)*, U.N. Committee on Economic, Social and Cultural Rights, 21st Session Period, November 15 to December 3, 1999, U.N. Doc. E/C.12/1999/10 (1999), ¶ 6 [hereinafter General Comment No. 13].
[197] CRC, *supra* note 128, art. 28.

1. The State Violated Violeta's Right to an Education that Is Accessible and Acceptable.

a. By applying to Violeta a policy that has a discriminatory effect, the State violated Violeta's right to an education that is accessible.

Accessibility encompasses three distinguishable but overlapping dimensions: nondiscrimination, physical accessibility, and economic accessibility. Non-discrimination means that "education must be accessible to all, especially the most vulnerable groups, in law and fact."[198] Further, the prohibition against discrimination is "subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education and encompasses all internationally prohibited grounds of discrimination."[199] As set out in the discrimination section, an exclusion is discriminatory if it: (1) has the effect of impairing the rights of a group; (2) does not have legitimate justification, and (3) the criteria used to exclude are not proportionate to the legitimate justification.

Violeta was denied the right to attend day school during the 1998-1999 academic year pursuant to a policy of not enrolling children without birth certificates. Violeta is not alone; many schools refuse to enroll undocumented children.[200] And in fall of 2004, the Ministry of Education issued a directive that children cannot complete elementary school without a birth certificate.[201] Violeta was one of these children. Violeta's educational experience was harmed and her safety endangered when she was forced to attend night school because she did not have a birth certificate. The State violated her right to an accessible education.

The effects of the birth certificate requirement on enrollment discriminated against Violeta and children of Haitian descent. Ms. Amada Rodriquez, the director of Violeta's school, stated to MUDHA attorneys that "students without documents or birth certificates attend the evening adult literacy program" instead of day school.[202] Dominican children of Haitian descent are more likely than others to lack an *Acta* because their parents lack *cédulas*.[203] The stringent requirements for obtaining a birth certificate bar thousands of Haitian-Dominican children, including Violeta, from obtaining this crucial identity document.[204] The State exacerbates these children's social exclusion by making this unattainable document a prerequisite to school enrollment. Thousands of Dominican children of Haitian descent cannot enroll in school, are threatened with expulsion or drop out as a result.[205] The policy of not enrolling children without *Actas*, discriminated against Violeta and violates the first prong of the discrimination test.

Additionally, the goals of state policy as well as the means used must conform to anti-discrimination principles. Where children are involved, the means must be narrowly tailored to

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[198] General Comment No. 13, *supra* note 196, ¶ 6.
[199] *Id.*, ¶ 31, *see* Tomasevski Amicus Brief, *supra* note 193, at 6.
[200] *See* Rincón Decl., *supra* note 15, at 2-3.
[201] *Limitan inscripción*, *supra* note 52.
[202] Declaration of Enrique Henriquez Peguero of August 6, 1999; Victims' Petition, *supra* note 15, Anexo 28, ¶ 1.
[203] *See generally* Section V(C)(2) above.
[204] *See supra* note 119 and accompanying text.
[205] Lack of education also significantly reduces future wages. CIES Amicus, *supra* note 54, at 5.

achieve the ends. The State asserts that the birth certificate requirement is necessary to establish the identity of the child and to establish that the person registering the child in school is entitled to act as the child's guardian. Yet, the State is obligated to fulfill the right to education under international as well as domestic law. Professors Packer and Tomasevski agree that it is unreasonable to make education contingent on an administrative obstacle such as a birth certificate which is difficult to obtain.[206] This right and duty do not turn on the lawfulness of the child or the parent. Depriving a child of the right to education increases his or her vulnerability and does not serve the interests of the child or the state.[207]

Professor Packer also noted that when a child comes to school to enroll "there are many means by which you could identify the name of the child. I would suggest the most material one is the fact that they are there." When one weighs the relative ease with which the Dominican Republic could adopt a more inclusive identity document requirement against the irreversible harm caused to thousands of children by exclusion from education, it becomes clear that this requirement is not proportional, and, therefore, illegal under the third prong of the discrimination test.[208]

b. By forcing her to enroll only in night school, the State violated Violeta's right to an education that is physically accessible, and acceptable.

After being expelled from elementary day school, Violeta and the MUDHA team followed a series of steps that ultimately resulted in her admission to an evening adult literacy program, the only alternative available for her to continue her studies.[209] However, the availability of a basic adult education program in no way absolves the State of its duty to guarantee Violeta an education. The program met neither the requirement of physical accessibility nor acceptability. Physical accessibility means that "education has to be within safe physical reach."[210] Violeta was forced to walk through dangerous neighborhoods alone and at night, violating her right to an education that was physically accessible.[211]

Acceptability refers to the teaching method and subject matter: "the form and substance of education, including curricula and teaching methods, have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students."[212] According to the Committee on the Rights of the Child, the right to education has a qualitative dimension that "insists upon the need for education to be child-centered, child-friendly and empowering."[213] But the adult literacy program was, as its name suggests, not designed for children. Indeed Ms. Rodriguez herself

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[206] Packer Testimony, *supra* note 129; Tomasevski Amicus Brief, supra note 193 at 7.
[207] Packer Testimony, *supra* note 129.
[208] The root of the problem here lies in the original discriminatory denial of birth registration, as set out in the section of this memorandum entitled: Arguments on the Merits, (II), above. Nonetheless, until the Dominican Republic reforms its birth registration regime, the birth certificate requirement for school enrollment will be in violation of the right to non-discriminatory education as applied to Haitian-Dominican children.
[209] Violeta Decl., *supra* note 27, ¶ 3.
[210] General Comment No. 13, *supra* note 196, ¶ 6.
[211] Victims' Petition, *supra* note 15, at 50-53.
[212] General Comment 13, *supra* note 210, ¶ 6.
[213] General Comment No. 1, of April 17, 2001, *The Aims of Education (Art. 29(1))*, U.N. Committee on the Rights of the Child, U.N. Doc. CRC/GC/2001/1 (2001), ¶ 2.

stated that under Dominican law night school is meant for adults, not children.[214] Professor Tomasevski provides the rationale behind such a law by explaining that international education standards divide education into stages by age level from pre-school to adult school. These divisions parallel the stages of child and human development; going through all the stages is necessary for proper child development. She emphasizes that "[r]elegating school age children to an adult school...defies not only the spirit and wording of international human rights law but also the very meaning and purpose of education."[215]

Ms. Rodriguez testified that Violeta was not harmed academically by attending adult night school. She stated that adult night school combines two years into one so that Violeta was able to complete eight grades in eight years.[216] Yet this begs the question of content – the standard for acceptability is the acceptability of scholastic content. Night school was totally unacceptable for a girl Violeta's age given its content and quality of education and pedagogical methods. As Dr. Munzcek emphasized, Violeta absolutely hated and feared attending night school and would never have done it of her own free will.[217]

2. By Denying Access to Primary, Secondary, and University Education, the State Violated Violeta's and Dilcia's Right to an Education that is Accessible.

Due to the Commission's Precautionary Measures, Violeta was able to re-enroll in day school for the 1999-2000 school year. Yet she was not able to obtain an *Acta* – the enrollment requirement – until September 25, 2001. Even when Violeta did obtain her birth certificate, the document was granted in violation of the regulations and current policies of the country. The document could be legally revoked at any moment. Throughout her childhood, then, Violeta has lived with the constant risk that she would be expelled from day school.

The risk that the birth certificates could be revoked is made even more serious by the fact that this document is also necessary for enrolling for the national high school entrance exam, for receiving a high school diploma, and for enrolling in college.[218] The State violated Violeta's right to education not only by expelling her from primary school, but also by failing to remove the obstacles to her access to a high school and university education. Dilcia's rights are also violated in this way. In sum, the violation of Dilcia's and Violeta's right to education will not be rectified until the internal rules are modified either by eliminating birth certificate requirement for enrollment, or by ensuring that the system of birth registration complies with international standards.

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[214] Rodriguez Testimony, *supra* note 7.
[215] Tomasevski Amicus Brief, *supra* note 193 at 6.
[216] Rodriguez Testimony, *supra* note 7.
[217] Munczek Testimony, *supra* note 30.
[218] According to Violeta: "Although I was able to enroll in seventh grade, I worry that I will not be able to take the national exams after eight grade without my birth certificate." Violeta Suppl. Decl., *supra* note 27, ¶ 6.

B. Article 26 Also Protects the Right to a Free, Compulsory Primary Education That is Accessible and Acceptable.

While we have emphasized the role of Article 19 in protecting the right to education, Article 26 also plays an important role in protecting this universal right. The Victims had a right to a free, compulsory education under Article 26, which provides:

> The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.[219]

Until now, this Court has not taken the opportunity to define the normative content of this provision. Accordingly, the Victims' Complaint carefully examined the scope of economic, social, and cultural rights (ESCR) under Article 26 in light of the American Charter, the American Declaration, and the international *corpus juris* on ESCR.[220] We refer the Court to that document for the legal reasoning behind our interpretation of Article 26.

VIII. THE STATE VIOLATED DILCIA'S AND VIOLETA'S RIGHT TO A NAME UNDER ARTICLES 18 AND 19.

Article 18 of the Convention provides in relevant part that:

> Every person has the right to a given name and to the surnames of his parents or that of one of them. The law shall regulate the manner in which this right shall be ensured for all. . . .

Like the right to nationality and juridical personality, the right to a name is a fundamental, nonderogable right.[221] This right is integrally related to one's identity and is associated with the rights of privacy and juridical personality.[222] Registration of a child under his or her name is crucial to guaranteeing these protections. The Court should adjudicate this claim despite the fact that the Commission did not present it.[223] The important relation between Articles 18 and the special protections due to a child under Article 19 and the CRC offer the Court an opportunity to strengthen protections for children.

Under the CRC, the right to a name imposes special duties on the state. The state must allow every child to have an identity, and it must ensure this right quickly. If a child is deprived

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[219] Convention, *supra* note 117, art. 26.
[220] Victims' Petition, *supra* note 15, at 35-47.
[221] Convention, *supra* note 117, art. 27(2).
[222] *See* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 432 (1993).
[223] *See* Victims' Petition, *supra* note 15, at 60-61.

of an aspect of her identity, such as her name, the state has a "duty to provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity."[224]

In the cases of Dilcia and Violeta, the State violated the right to a name by not allowing the girls to register, in part because their names "sounded Haitian."[225] It then further violated Article 18 by omitting its duty to provide appropriate assistance and protection in speedily establishing the Victims' identity. Indeed, the *Procurador Fiscal* took ten months to respond to the Victims' first appeal, and then left the girls in the same unregistered status as before. The JCE demonstrated their full support for *Procurador Fiscal*'s decision in its letter of September 1999.

Furthermore, the State has still not remedied the violation. The documents that it finally provided in 2001 – four years after the Victims first solicited them – were granted illegally and are thus subject to revocation at any time. The provision of insecure documents in no way satisfies the duty to reestablish speedily the child's identity through registration of her name. The violation is thus ongoing.

IX. THE STATE VIOLATED DILCIA'S AND VIOLETA'S RIGHT TO FAMILY UNDER ARTICLES 17 AND 19.

We refer the Court to the Victims' Petition for the argument and supporting evidence proving that the State violated the Victims' right to a family.[226]

X. THE STATE VIOLATED AND CONTINUES TO BE IN VIOLATION OF CONVENTION ARTICLES 1 AND 2.

The State has violated Articles 1 and 2 of the Convention by violating its obligations to "respect" and "ensure" the free and full exercise of all the rights and liberties protected by the Convention, and to adopt all the internal measures necessary to make those rights and liberties effective.

A. The State's Violation of Its Duty to Respect and Ensure Rights Under Article 1.

The Court has acknowledged that Article 1 of the Convention "specifies the obligation assumed by the States Parties in relation to each of the rights protected. Each claim alleging that one of those rights has been infringed necessarily implies that Article 1(1) of the Convention has also been violated."[227] By refusing to register Dilcia and Violeta for years, and by excluding Violeta from school, the Dominican State has violated the obligations found in 1.1 of the Convention as they relate to Articles 20 (nationality), 24 (equality), 25 (judicial protection), 8

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[224] CRC, *supra* note 128, art. 8.
[225] Rincón Decl., *supra* note 15, at 6; *see also*, Bienvenida Testimony, *supra* note 5.
[226] Victims' Petition, *supra* note 15, at 62-63.
[227] *Velásquez Rodríguez Judgment, supra* note 69, ¶¶ 162, 164; *"Godínez Cruz" Case,* Judgment of January 20, 1989 Inter-Am. Ct. H.R. (Ser. C) No. 5, ¶¶ 171, 173; *Neira Alegría et al. Case*, Judgment of January 19, 1995, Inter-Am. Ct. H.R. (Ser. C) No. 20, ¶ 85.

(due process), 26 (education), 19 (children), 3 (juridical personality), 18 (name) and 17 (family). The State is responsible under international law for these abuses, caused by its own failure to adopt efficient measures in the judicial, legislative, and executive realm that "organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."[228]

B. The State's Violation of Its Duty to Adopt Internal Measures to Make Dilcia and Violeta's Rights Effective Under Article 2.

The State has violated its duty under Article 2 to introduce the reforms necessary to meet its obligations under the Convention. According to the Court:

> This general obligation means that the state must adopt all necessary measures to ensure that the provisions of the Convention are complied with effectively in its domestic laws...Such measures are only effective once the State adapts its actions to the protective norms of the Convention. [229]

The Victims have demonstrated that the State violated its Article 2 duties. From the time of the State's initial denial of birth registration to Dilcia and Violeta to the present, the State has failed to establish formal internal procedures within its domestic laws to make effective the Victims' rights to special protection as children, non-discrimination, education, nationality, juridical personality, judicial protection and due process, name and family.[230]

Taken together, new legislation and regulations passed since 2003 create a new birth registration regime. Yet, like its predecessor, this regime falls short of international and constitutional law, particularly as implemented. The State remains in violation of the rights of Dilcia and Violeta.

1. The State *Still* Has Not Adopted a Procedure for Registering Births that Adequately Respects the Rights of Nondiscrimination, Special Protection of Children, Nationality, Juridical Personality, Name, and Family.

Recent changes to the Dominican birth registration process include JCE Resolution 07/2003, Migration Law No. 285-04, and the New Code for the Protection of Boys, Girls, and Adolescents. While simplifying the requirements for birth registration, the JCE Resolution fails to resolve the exclusion of thousands of eligible children, like Dilcia and Violeta, from birth registration, leaving them without legal protection. In fact the Migration Law exacerbates the problems faced by children of Haitian descent, thus undermining the potential contribution of the New Code. Furthermore, the State has failed to put into place the institutions that would make the New Code effective. Thus, the new Code is insufficient to guarantee Diclia's and Violeta's rights effectively under Article 2.

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[228] *Velásquez Rodríguez Judgment*, *supra* note 69, ¶ 166.
[229] *Legal Status*, *supra* note 1, ¶ 167 (quoting *Cinco Pensionistas Case,* Judgment of February 28, 2003, Inter-Am. Ct. H.R. (Ser. C) No. 98, ¶ 164)).
[230] *See* Victims' Petition, *supra* note 15, at 66-68.

2. The State *Still* Has Not Adopted a Procedure for Registering Children in School That Adequately Respects the Rights Of Education and the Rights of the Child.

Significantly, Paragraph II of Article 45 of the New Code for Boys, Girls and Adolescents establishes that education cannot be denied because the child does not possess identity documents.[231] However, the gap between law's promise and the reality on the ground is vast. The Ministry of Education recently announced that children could only attend elementary school until the fourth grade without *Actas*.[232] Thereafter, they will not be allowed to enroll. Clearly, the right to education is still vulnerable to the vicissitudes of anti-Haitian politics and abuse of discretion.

3. The State *Still* Has Not Attempted to Change Informal Norms and Practices or Curb Discretion by Local Officials That Cause Violations of the Convention.

A large part of the problems faced by Dilcia and Violeta lies not with rules and legislation but rather with the ease and impunity with which State officials use their discretion to bypass rules and legislation. As the civil registrar testified, her superiors reviewed and approved her denial of the Victims' birth registration.[233] Yet the State has done nothing to curb this discretion or change the informal norms and practices that hurt the Victims.

REPARATIONS

The Dominican Republic has a duty to make reparations to Dilcia and Violeta and their families for the harms they have suffered as a result of the State's violation of their human rights. Article 63(1) of the Convention states:

> If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

The purpose of restitution measures is to make the victim whole by providing *restitutio in integrum* or full restitution for the damages caused.[234] *Restitutio in integrum* "consists of reestablishing the previous situation." If that is not possible, the Court must order that steps be taken to guarantee the rights infringed, redress the consequences of the infringements, and

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[231] "En ningún caso podrá negarse la educación a los niños, niñas y adolescentes alegando razones como: la ausencia de los padres, representantes o responsables, *la carencia de documentos de identidad* o recursos económicos o cualquier otra causa que vulnere sus derechos." New Code for the Protection of Boys, Girls, and Adolescents, *supra* note 46, art. 45, ¶ 2 (emphasis added).

[232] *Limitan inscripción*, *supra* note 52.

[233] Bienvenida Testimony, *supra* note 5.

[234] *Velásquez Rodríguez Case*, Interpretation of the Compensatory Damages Judgment, Judgment of August 17, 1990, Inter-Am. Ct. H.R. (Ser. C) No. 9, ¶ 27.

determine payment of indemnification as compensation for damage caused.[235] Reparations are classified into measures of satisfaction and monetary damages.

This Court should order the Dominican Republic to make full restitution for its violations. In this case, a judgment by the Court alone is insufficient to ensure that the violations will not be repeated, nor will a judgment make the victims whole again from the severe emotional and economic harm they have suffered. Consequently, Dilcia and Violeta request the following forms of relief:

I. VICTIMS REQUEST MEASURES OF SATISFACTION AND NON-REPETITION

A. The State Should Publicly Acknowledge Its Violations of Victims' Rights.

The Dominican Republic should offer a public apology to the Dilcia, Violeta, and their families for violating their rights. This public acknowledgment of responsibility should be made by the President of the Dominican Republic to send a clear message that the State is committed to eradicating its discriminatory practices.

The State should also ensure that the public is aware of the Court's decision by publishing the Court's decision in the official Gazette, as well as newspapers of wider circulation. In order to reach a broad audience, the State should also broadcast the decision over the radio. Moreover, because discrimination is widespread among the Dominican population, the State should initiate a public awareness campaign to address anti-Haitian discrimination.

B. The State Should Reform Its Birth Registration System to Prevent Repetition of Harm.

When the State issued their birth certificates in 2001, Dilcia and Violeta did not fulfill the eleven birth registration requirements then in effect, according to the *Procurador Fiscal* and the JCE. Nor have they fulfilled the list of requirements currently in effect as established by JCE Resolution 07/2003. Consequently, the State could revoke their birth certificates at any moment, which would strip them of the legal protections granted by their citizenship status, and thereby render them vulnerable yet again to expulsion from school and deportation. Only by reforming its birth registration system will Dilcia's and Violeta's right to nationality, and that of thousands of other children of Haitian descent, be protected.

The Court should therefore order the State to establish reasonable requirements for registering births. To do so, the State should eliminate the current requirement, as established by JCE Resolution 07/2003, that parents must provide proof of legal residency in order to register their child's birth. The residency card is not necessary to prove the parents' identity, as less restrictive alternatives exist. Consequently, the State should allow parents to present alternative forms of identification, such as a *carnet de trabajo*, a *carnet del consejo estatal del azúcar*, a *tarjeta consular*, a birth certificate, or a foreign passport. Such reform would allow children

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[235] *Barrios Altos Case,* Reparations (Art. 63(1) American Convention on Human Rights), Judgment of November 30, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 87, ¶ 25.

born in the Dominican Republic of Haitian descent to register their births free from the illegal presumption that they are illegal and without rights.

The passage of Migration Law No. 285-04 also affected the birth registration regime. First, it arbitrarily interprets the Dominican constitution by expanding the "in transit" exception to include non-residents, including migrant workers.[236] This provision thereby excludes the children of Haitian migrant workers from vindicating their right to Dominican nationality. Consequently, Paragraph I of Article 36 of the new Migration Law must be eliminated. Second, the new Migration Law stipulates that hospitals are to issue rose-colored *constancias de nacimiento* to children born of foreign mothers.[237] Since *constancias de nacimiento* are required for birth registration, this provision allows State officials to exercise discretion discriminatorily to the detriment of children born to undocumented as well as documented migrants. Third, it requires foreign mothers to register their children in the embassy of their country.[238] Because these provisions directly contradict the principle of *jus soli* enshrined in the Dominican constitution, Article 28 of the new Migration Law must also be removed.

C. The State Should Adopt Affirmative Measures to Register Dominican Children of Haitian Descent.

To comply with its Convention obligations, the State should register all children born in the country, irrespective of their ancestry, in accordance with domestic and international law. Because of the historic exclusion of children of Haitian descent from birth registration, the Court should order the State to implement registration drives for registering the births of children of Haitian descent born in the Dominican Republic. In rural areas, the excessive expense of the registration process impedes parents from achieving this objective. Therefore, the State should take affirmative action to guarantee the registration of children in the most marginalized communities, such as the *bateyes*, by sending representatives from the *oficialías* to these communities and eliminate any costs to families associated with birth registration.

D. The State Should Guarantee Access to Education for All Children.

Despite guarantees of access to education for all children provided in the Dominican constitution and the New Code for the Protection of Boys, Girls, and Adolescents, the Ministry of Education recently announced that children that do not have birth certificates will only be allowed to enroll in elementary school until the fourth grade. Expulsion from elementary school for not having a birth certificate has long been the policy and practice of the State, as Violeta's experience clearly demonstrates. In order to ensure that all children have the opportunity to obtain an education, the Court should order the State to eliminate the birth certificate as a prerequisite for school enrollment.

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[236] REDH Amicus Brief, *supra* note 34, at 11; Migration Law No. 285-04, *supra* note 40, art. 36, para. I.
[237] Migration Law No. 285-04, *supra* note 40, art. 28(1).
[238] *Id.* art. 28.

E. The State Should Provide Effective and Efficient Judicial Review for Denials of Birth Registration.

The new legislative regime fails to provide applicants for birth registration with access to a remedy that complies with the standards established by articles 8 and 25 of the Convention and this Court's jurisprudence. Given the rights at stake, it is particularly important for applicants to be afforded a prompt and simple judicial recourse, the opportunity to be heard and present evidence, the right to legal counsel as well as other due process guarantees. Moreover, the rules of procedures and decisions of the judicial body should be guided by the overarching principle of the best interest's of the child.

II. VICTIMS ARE ENTITLED TO MORAL DAMAGES.

The Court may require a state to compensate victims and their family members for non-pecuniary or moral damages. These damages may be based on:

> [T]he serious circumstances of the present case, the terrible suffering that the respective events cause the victim and that, in one form or another, brought pain and suffering upon his family as well, the changes forced upon the lives of the victim and his family, and the other non-material or non-pecuniary consequences thrust upon them all, the Court is ordering payment of compensation for non-pecuniary damages, based on the principle of equity.[239]

The Court recognizes that family members share in the victim's suffering and are consequently entitled to moral damages.[240]

As Dr. Munczek testified, Dilcia and Violeta's worldview was shaped by the denial of their birth certificates, as it "impacted [them] deeply and directly."[241] Violeta spent years avoiding leaving her house and community for fear that she would be deported to Haiti.[242] At a young age, Dilcia likewise learned through her caretakers of the adverse consequences of being considered Haitian – most terrifyingly that she could be deported to Haiti.[243]

Both of the mothers continue to fear that their daughters might be forcibly taken from them and deported to Haiti even after the State issued their *Actas*.[244] Not only are their birth certificates of questionable validity, experiences of family and community members have taught

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[239] *Cantoral Benavides Case,* Reparations, Judgment of December 3, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 88, ¶ 57.

[240] *See Id.*, ¶ 61a ("[T]he Court's *jurisprudence constante* is that in the case of a victim's parents, moral damages need not be shown."); *see also Suárez Rosero Case*, Reparations, Judgment of January 20, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 44, ¶ 66 (awarding moral damages to the victim's family due to the "existence of grave violations to the detriment of [victim];" there was presumed effect on his family.)[hereinafter *Suárez Reparations*].

[241] Munczek Testimony, *supra* note 30.

[242] *Id.*

[243] *Id.*

[244] *Id.*

them that the possession of a valid birth certificate provides no guarantee that state officials will not arbitrarily exercise their discretion by disregarding official documentation.[245]

Moreover, issuing her birth certificate did not remedy the harm caused Violeta by being expelled from elementary school and forced to attend adult night school. According to Dr. Munczek, this experience was traumatic for her.[246] Not only was the education she received of an inferior quality, but she also feared traveling to and from school through a dangerous neighborhood every night in order to continue her education.[247] Dr. Munczek also found that attending night school deprived her of the opportunity to socialize with her peers, thereby negatively affecting her development. Consequently, the Court should order the State to compensate Violeta for these harms.

Growing up in a discriminatory society, and having their exclusion from the "charmed circle of cultural citizenship" confirmed by the actions of State officials, permanently affected Dilcia and Violeta. The loss of self-esteem accompanying this exclusion has manifested itself in both Dilcia and Violeta. Violeta has expressed her desire to change her last name.[248] At her young age, Dilcia has already learned that "haitiano" is an insult and that she should be offended when her peers refer to her as such.[249]

Nevertheless, both girls through the support of their families have sought to overcome the formidable obstacles constructed by state action to hinder their development. Violeta has indicated that "quier[e] seguir estudiando porque sin educación no [tiene] futuro."[250] She is already the first in her immediate family to attend secondary school, making her plans to obtain a university degree all the more laudable.[251] Dilcia likewise has stated that "cuando sea mayor, quiero trabajar en una oficina cerca de mi familia."[252]

Monetary compensation alone cannot rectify the harms caused by the violation of their rights. State actions have left a lasting imprint on both girls and their self-esteem and their sense of their place in society. The State should compensate the Victims for their injuries and thereby recognize its responsibility for hindering their psychosocial development. Given the Victims' remarkable persistence in receiving an education – even in the face of expulsion from school and the risk that their birth certificates will be revoked and they will no longer be able to continue their studies – the State should assist the Victims in their efforts to complete their education by establishing scholarship funds to cover the costs of tuition and living expenses for their primary, secondary, and advanced studies.

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[245] *Id.*
[246] *Id.*
[247] *Id.*
[248] *Id.*
[249] *Id.*
[250] Declaration of Violeta Bosico, dated 2 February 2005.
[251] *See id.*
[252] Declaration of Dilcia Yean, dated 3 February 2005.

III. PAYMENT OF THE COSTS OF LITIGATION.

As a rule, reparations to victims must include compensation for the reasonable legal costs and expenses incurred in their efforts to obtain justice, including representations before the Inter-American system.[253] Those expenses are a natural consequence of actions taken by victims' representatives to obtain a Court judgment recognizing the violation committed and establishing its legal consequences. We respectfully refer the Court to the Victims' Complaint and Exhibits for a further elaboration of our demands for costs and expenses and their legal and empirical foundations.[254]

CONCLUSION

For the foregoing reasons, petitioners respectfully request the Court to find that the Dominican State illegally has refused to register their births and, in doing so, has violated the following rights of the Victims guaranteed under the Convention and Declaration: (1) the right to juridical personality (Convention, Article 3); (2) the right to nationality (Convention, Article 20), (3) the right to a name (Convention, Article 18); (4) the right to a family (Convention, Article 17); (5) the right to protection of childhood (Convention, Article 19); (6) the right to education (Convention, Articles 12, 19, 26); (7) the right to personal integrity (Convention, Article 5); (8) the right to due process (Convention, Articles 8 and 25); (9) the right to judicial protection (Convention, Article 25); and (10) the right to equal protection (Convention, Article 24).

In recompense for these violations, Original Claimants and their families request the Court to require the State to pay damages and institute corrective measures, as follows:

1. Publicly acknowledge its responsibility for violating Dilcia's and Violeta's human rights and affirm its commitment to protecting and ensuring those rights and the rights of Dominican-born children of Haitian descent;

2. Amend its birth registration system to conform to its obligations under the Convention;

3. Take affirmative steps to register Dominican-born children of Haitian descent because without such assistance to the Victims' communities other reparations will be ineffective;

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[253] *See Baena Ricardo et al. Case*, Judgment of February 2, 2001, Inter-Am. Ct. H.R. (Ser. C) No. 72, ¶ 204; *see also Loayza Reparations, supra* note 65, ¶ 178 (ordering indemnification of costs and expenses incurred in representations in proceedings before domestic courts and before the Commission and the Court); *Blake Case, Reparations*, Judgment of January 22, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 48, ¶ 69 (ordering compensation of costs and expenses incurred with the Commission and the Court, as well as compensation for costs and expenses incurred in the search for the body and medical expenses for ailments caused by violation of rights); *Suárez Reparations*, *supra* note 240, ¶¶ 90-100 (ordering indemnification of costs and expenses incurred in litigation before domestic court authorities and before the Court).

[254] Victims' Petition, *supra* note 15, at 68-79; *see also* Exhibit B attached to this document.

4. Guarantee access to education for all children irrespective of whether they possess legal identification; and

5. Provide effective and efficient judicial review of denials of birth registration requests.

To repair the damage violation of their rights has caused Dilcia and Violeta, we respectfully request the Court order the State to:

1. Compensate Dilcia and Violeta for their moral damages and damages to their life plans by guaranteeing to each victim a full scholarship to attend public university for such time necessary to obtain a post-graduate degree.

2. Compensate Dilcia $8,000, Violeta $8,000, Tiramen Cofi $4,000, Teresa Tuseimena $2,000, and Leonidas Oliver Yean $4,000 each, for moral damages inflicted by the State's violations; and

3. Compensate Dilcia and Violeta and their representatives for costs and expenses incurred as a result of being forced to vindicate their rights before national authorities and within the Inter-American system as set forth below:

a. MUDHA seeks reimbursement for costs and expenses incurred or reasonably expected future costs in the amount of $ 4,513.13.

b. CEJIL seeks reimbursement for costs incurred or reasonably expected future costs and a token amount for attorney fees in the amount of $ 37,995.945.

c. The International Human Rights Law Clinic seeks reimbursement for costs incurred or reasonably expected future costs and a token amount for attorney fees in the amount of $50,000.

5. In addition, the Dilcia and Violeta and their families respectfully requests that the Honorable Inter-American Court of Human Rights order that:

a. The State of Dominican Republic shall pay the amounts of compensation required within six months from the date of issuance of its judgment;

b. Payment of that compensation shall be in United States dollars;

c. The calculation of the compensation and manner of payment shall take into account the need to maintain the purchasing power of the award, including devaluation and depreciation;

d. The payment of the compensation shall be free of any taxes currently in effect or that may be levied in the future.

Finally, the Victims and their families request that in its judgment, the Honorable Court decide to maintain jurisdiction over this matter until such time as the Dominican State complies with all the measures of reparation therein ordered.