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

BY

THE INTERNATIONAL HUMAN RIGHTS CLINIC OF THE LOYOLA LAW SCHOOL LOS ANGELES

AND

CO-SIGNED BY

TWENTY-FIVE ACADEMICS AND PRACTITIONERS OF HUMAN RIGHTS AND INTERNATIONAL

LAW

IN THE CASE OF

Nadége Dorzema et al. v. Dominican Republic

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PART I – INTRODUCTION

I. Authors of This Amicus Curiae Brief

1. This amicus curiae brief has been prepared by the International Human Rights Clinic program of the Loyola Law School Los Angeles. Prof. Cesare Romano is the director of the clinic. Prof. Romano has supervised the preparation of this brief by three of his students (Karl Durow, Hansen Tong and Inderjot Hundal).

2. The list contained in Annex I to this brief contains the names of individuals and organizations that have decided to sign on to this brief because they agree with its content. Thus, this brief should be considered a joint submission of both the authors and the signatories for the purpose of the application of the Court’s Rule of Procedures.

II. Legal Basis for this Brief

3. According to the Court’s Rules of Procedure Article 44.1: “Any person or institution seeking to act as amicus curiae may submit a brief to the Tribunal...” 1 And, according to Article 2.3, “the expression “amicus curiae” refers to the person or institution who is unrelated to the case and to the proceeding and submits to the Court reasoned arguments on the facts contained in the presentation of the case or legal considerations on the subject-matter of the proceeding by means of a document or an argument presented at a hearing”. 2

III. Aim

4. The authors of this brief, international human rights scholars and practitioners, respectfully offer to this Honorable Court reasoned arguments on some legal aspects of the Nadége Dorzema et al. v. Dominican Republic (hereinafter “Guayabin Massacre”) case. Our considerations are not necessarily in support of any of the parties involved in this case. We approach this Court truly as its amici (“friends”), with the preservation and development of the Inter-American human rights legal system as the sole interest in our mind.

5. The aim of this brief is to respectfully suggest that the Court closely examine three legal issues in the case that have been previously neglected or have received little attention in the briefs submitted by the parties.

6. The first issue is the violation by the Dominican Republic of Article 3 of the American Convention on Human Rights (“Right to Juridical Personality”) (see Part II). The facts in the case suggest that the survivors of the massacre were not processed through the Dominican Republic’s legal and judicial system and were therefore de facto treated as objects and denied their right to “juridical personality”, as well as the related right of all persons to human dignity.

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1 Rules of Procedure of the Inter-American Court of Human Rights, Art. 44.1, as amended by the Court during its LXXXV Regular Period of Sessions, held from November 16 to 28, 2009.
2 Id.
7. The second issue is the violation by the Dominican Republic of the Vienna Convention on Consular Relations (see Part III). While this Court does not have jurisdiction \textit{ratione materiae} over that treaty, we argue that the rights contained in the Vienna Convention do come within the scope of its jurisdiction via Article 8 and 25 of the American Convention (“Right to Fair Trial” and “Right to Judicial Protection”, respectively). But we also argue that an analysis of only Article 8 and 25 without reference to the Vienna Convention would lead to a truncated judgment and also be a missed opportunity for this Court to pronounce itself, in the context of a binding decision, on crucial rights affecting a particularly vulnerable group.

8. Finally, the third issue is the violation by the Dominican Republic of Article 22.9 of the American Convention (“Prohibition of Collective Expulsions”) (see Part IV). The facts in the case suggest that the survivors of the massacre were collectively expelled. The Dominican Republic has a long history of collectively expelling Haitians and this case provides an ideal opportunity for the Court to expand on Inter-American jurisprudence in regards to collective expulsions.

9. \textit{Amici} believe this case provides an ideal opportunity for the Court to shed some light on the scope and reach of rights in these three important areas which have been, to date, rarely explored not only by the Court and the Commission, but also by other human rights bodies around the world. Thus, we offer a few considerations of legal nature to the Court to highlight the ramifications of a decision on each of these three issues should the Court decide to do so.

\section*{PART II – VIOLATION OF RIGHT TO JURIDICAL PERSONALITY}

\subsection*{I. Introduction}

10. Article 3 of the American Convention on Human Rights reads: “Right to Juridical Personality: Every person has the right to recognition as a person before the law.”\footnote{American Convention on Human Rights (Pact of San José, Costa Rica), adopted 22 November 1969, entered into force 18 July 1978, OAS Treaty Series No. 36, Art. 3.} The right to juridical personality is the key-stone of international human rights. The respect of the juridical personality is necessary to enable all rights under the Convention, as well as under all other human rights instruments. The paramount importance of this right notwithstanding, the Inter-American Commission and Court have rarely considered cases where violations of Article 3 have been alleged. The facts in the “Guayabin Massacre” raise serious doubts about the Dominican Republic’s compliance with Article 3 of the Convention. The present case provides an opportune occasion for the Court to develop its jurisprudence on this important article.

11. Violation of Article 3 has not been raised by the Commission. However, it is raised by the representatives of the victims.\footnote{See Escrito Sobre Argumentos y Pruebas, 96 ff.} In this way, we would like to point out that this Court, by virtue of the principle \textit{iura novit curia}, could inquire into whether any such violation has occurred. The principle \textit{iura novit curia} is well established in international jurisprudence,\footnote{Military and Paramilitary Activities (Nicaragua v. the United States of America), Merits, Judgment, 27 June 1986, I.C.J. Reports 1986, 24-25; The Case of the S.S. “Lotus” (France v. Turkey), Judgment, 7 September 1927,} and has been relied upon by this Court on a number of occasions.\footnote{\null}
II. Individual juridical personality as recognized in human rights instruments

12. The “right to juridical personality”, sometimes referred to also as the “right to legal personality”7, entails the right to be recognized and treated as a person before the law. Being treated as a “person before the law” means being recognized as an individual with rights and duties under the relevant legal system.8 When individuals are not a recognized “juridical personality” they are essentially treated as objects – such as trees, rocks and animals – and not subjects by the legal system. They are also deprived of their related right to human dignity. For example, in ancient times the Romans used to strip slaves of legal personality, in order to dispose of them as objects.9

13. Thus, the individual’s right to juridical personality is at the very foundation of the modern concept of human rights. It is a gateway right, controlling access to all other rights. If one does not possess juridical personality, all discussion about one’s rights is pointless.

14. The paramount importance attributed to the right to be recognized as a person before the law is clearly demonstrated by the range of international legal instruments enshrining this right and by the treatment afforded to this right in those instruments.

15. The right to juridical personality was first codified in the 1948 Universal Declaration of Human Rights: “Article 6. Everyone has the right to recognition everywhere as a person before the law.”10 Article 1 of the Declaration also guarantees the right of all persons to human dignity, a right that is reaffirmed in the preamble to the United Nations Charter and in many human rights treaties.11


7 See, generally, F. Johns (ed.), International Legal Personality, Ashgate (2010).

8 In the Case of Bámaca-Velásquez v. Guatemala, this Court noted that Article 3 “implies the capacity to be the holder of rights (capacity of exercise) and obligations.” IACHR, Case of Bámaca-Velásquez v. Guatemala, 25 November 2000, ¶179.


16. The 1966 International Covenant on Civil and Political Rights repeated the right verbatim: “Article 16: Everyone shall have the right to recognition everywhere as a person before the law.” Moreover, according to Article 4.2 of the Covenant, Article 16 is an article that can never be derogated. The point has been reiterated by the United Nations Human Rights Committee in its General Comment 29 on “States of Emergency”. Even during the most serious of state emergencies, Article 16 of the Covenant, which is nearly identical to the American Convention’s Article 3, must be respected. And the American Convention requires that “[a]ll persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person” and that “[e]veryone has the right to have...his dignity recognized.

17. Additionally, the American Declaration of the Rights and Duties of Man reads: “Article XVII: Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights.” And the American Declaration declares that “All men are born free and equal, in dignity and in rights.”

18. The African Charter on Human and Peoples’ Rights substantially echoes the ACHR Article 3 provision, stating, in the relevant part: “Article 5: Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status.” The African Charter uses a slightly different formulation and combines the right to juridical personality with the prohibition of slavery, torture, and cruel, inhuman or degrading


13 Id. “Article 4: 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. 2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.”


15 Id.

16 American Convention on Human Rights, supra note 3, Art. 5.2

17 Id., Art. 11.1

18 American Declaration of the Rights and Duties of Man, supra note 11, Art. XVII.

19 Id., preamble.

20 African Charter, supra note 11, Art. 5.
punishment and treatment; however the rights embodied remain the same.

19. Additionally, the 2004 Arab Charter on Human Rights proclaims: “Article 11: All persons are equal before the law and have a right to enjoy its protection without discrimination.”

20. Curiously enough, the European Convention on Human Rights and Fundamental Freedoms does not contain an article expressly stating the right to juridical personality, but this peculiar omission is usually explained by the fact that the right is such an obvious right that it can be deduced from other articles in the treaty. The more recent Charter of Fundamental Rights of the European Union does not contain the right to juridical personality either, but again, the glaring absence can be equally explained by the fact that the right to juridical personality is a background right without which all rights could not be exercised. Thus, The Charter of Fundamental Rights, in Chapter III (Equality) declares “Article 20: Everyone is equal before the law”. Obviously, the capacity to appear before the law on an equal footing with every other individual depends first on one’s possession of juridical personality because without one, there cannot be the other.

21. Likewise, one can also read into the recognition of the right to juridical personality in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), because it contains a provision in Article 15 (1) stating that “States Parties shall accord to women equality with men before the law.” It further states in Paragraph 2 that “States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity.”

22. In sum, there seems to be little doubt that the right to juridical personality is universally recognized, and is firmly entrenched in the modern conception of human rights. It is embedded in contemporary notions of human existence and equal dignity. Given its centrality to the whole human rights edifice and universal observance, one could even argue that the right has, by now, acquired *jus cogens* status.

23. It should also be noted that, with the exception of the ICCPR, the provisions protecting individual juridical personality appear as an early article in each of the various treaties. It follows that if one is to infer the order of importance in which rights are listed within the American Convention, the drafters must have found this right so important and compelling they saw fit to place it among the first articles of the Convention, before the right to life, the right to humane treatment, the right to freedom from slavery, the right to personal liberty, the right to fair trial, and the right to freedom of religion, among others. The drafting history of the Convention indicates that the protection of juridical personality was adopted with ease, facing

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21 Arab Charter, *supra* note 11, Art. 11.
25 Id., Art. 15(2).
little objection.\textsuperscript{27} It further indicates that the provision was adopted “in view of its importance.”\textsuperscript{28}

24. The mere presence of individual juridical personality as a protected right in human rights instruments, including the American Convention, is indicative of the understanding that “a set of fundamental rights held by the individual are also seen as emanating from general principles of law.”\textsuperscript{29} That is, the right to be recognized under the law is inherent in many other rights recognized by the American Convention.

25. Again, the purpose of the right to juridical personality provisions, such as those contained in the American Convention Article 3 and the UDHR Article 6, are to make all other rights operational. It “guarantees the individual access to the legal system in order to have [all the other] rights and obligations enforced.”\textsuperscript{30} Most rights within this and other human rights instruments are meaningless unless a State party recognizes every person under the law and these persons are thereby protected by the rights contained within such instruments. Failure to recognize a person under the law would allow a State party to avoid providing any of the rights protected by the Convention. In the “Guayabin Massacre”, the violations alleged by petitioners all stem from the Dominican Republic’s initial failure to recognize them as persons under the law. Had the petitioners been recognized as such, Dominican authorities would have had to provide them the rights that everyone, including aliens, have as a matter of Dominican law.

26. By the same token, it could also be argued that violations of several other articles would simultaneously constitute a violation of the right to juridical personality. Thus, the due process rights (Article 8) and the right to judicial protection (Article 25) discussed later in this brief are rooted in, and inseparable from, the recognition of juridical personality. In order for a State to provide the minimum due process rights and judicial guarantees, as required by Article 8 and Article 25 respectively, a State must first recognize all persons under the law through Article 3. Likewise, the Article 22.9 prohibition of collective expulsions considered in this brief also implicates an Article 3 violation. At the very heart of the prohibition against collective expulsion lies the lack of individual review. There cannot be an individual review of one’s case unless one is recognized as a person under the law. This is precisely what distinguishes collective expulsion from permissible individual expulsion. In other words, recognition of juridical personality is a conditio sine qua non of the whole human rights edifice.

III. The Scope of the Right to Juridical Personality

27. Despite its importance, Article 3 of the American Convention has attracted relatively little commentary by human rights bodies, including the Inter-American Commission, the Court, and by legal scholarship.\textsuperscript{31} Again, the relative neglect may be due to the fact that the right to

\textsuperscript{27} T. Buergenthal and R. E. Norris, Human Rights: The Inter-American System, Oceana (1982), 159.
\textsuperscript{28} Id.
\textsuperscript{29} R. Portmann, Legal Personality in International Law, Cambridge University Press (2010), 132.
\textsuperscript{30} Alfredsson, supra note 22, at 148.
juridical personality is a self-evident right. Also, provisions on “juridical personality” tend to be limited in scope, and the rights they establish somewhat overlap with other rights that have been more prevalent in the case law of human rights bodies, such as freedom from discrimination or the right to a fair trial. Perhaps, the relative neglect could even indicate that this right is no longer breached frequently, thus making any instance of violation even more egregious.32

28. Whatever the reasons for this relative neglect, amici would like to offer to the Court a concise summary, based on international jurisprudence, of what exactly is the scope of the “right to juridical personality” and what it practically entails.

29. First, all relevant international human rights instruments recognize the right to juridical personality to “everyone”33, “every person”34, “all persons”35, and “every individual”36. The right to juridical personality is clearly not limited to a State’s citizens or those found within its jurisdiction, but to every person, wherever they are and whatever their status might be. With no existing jurisprudence to the contrary, certainly “every person” includes aliens, whatever their status might be or for whatever reason they might have entered a foreign State’s territory.  

30. Second, although individuals might be recognized juridical personality de jure, the lack of de facto recognition is what ultimately matters. In the Case of the Saramaka People v. Suriname, involving indigenous peoples and their property rights, this Court noted that the State was required to ensure that mechanisms were in place so that the indigenous tribe had juridical personality and could thereby exercise property rights.37 Of particular importance was the Court’s finding that Article 3 places a positive duty on states to ensure the conditions for adequate protection of juridical personality are met.

31. Likewise, in Kimouche v. Algeria, the United Nations Human Rights Committee found a clear violation of Article 16 of the Covenant of Civil and Political rights. As stated earlier, Article 16 of the ICCPR is identical in wording to Article 3 of the American Convention. In Kimouche, Algeria was accused of both contributing to and failing to investigate and prosecute the victim’s disappearance. In its report, the Human Rights Committee declared that:

“disappeared persons are in practice deprived of their capacity to exercise entitlements under law, including all their other rights under the Covenant, and of access to any possible remedy as a direct consequence of the actions of the State” [emphasis added].38


32 Joseph, supra note 9, at 302.
33 Universal Declaration of Human Rights, supra note 10, Art. 5; International Covenant on Civil and Political Rights, supra note 12, Art. 16.
34 American Declaration of the Rights and Duties of Man, supra note 11, Art. XVII.
35 Arab Charter, supra note 11, Art. 11.
36 African Charter, supra note 11, Art. 5.
37 IACRH, Case of the Saramaka People v. Suriname, 12 August 2008, ¶63.
32. It is noted that the Human Rights Committee’s “jurisprudence” regarding ICCPR Article 16 is limited, and focuses largely on situations of prolonged denials of juridical personality, such as in cases of disappearances, like the Kimouche case. However, the Committee’s analysis of the scope of the right to juridical personality is nonetheless insightful. In Kimouche, and in the subsequent cases affirming that decision,\(^\text{39}\) the material deprivation of capacity to exercise rights under the Convention is the key test. Although the petitioners in the “Guayabin Massacre” case were not parties to forced disappearance, they were similarly deprived de facto of their capacity to exercise their rights under the American Convention and domestic law.

33. It could be argued that because the survivors of the Guayabin Massacre were only briefly in the Dominican Republic’s territory before being expelled, the Kimouche line of decisions is inapplicable because those were instances of prolonged and indeed permanent denials of the “right to juridical personality”. However, first, it should be noted that the survivors of the Guayabin Massacre were denied their right to legal personality, not only during the limited time they were within the territory of the Dominican Republic, but also afterwards as they were not given a chance to argue their case. As is the case with forced disappearances, one could argue that this is a case where a “continuing violation” of human rights has occurred.

34. Indeed this leads to the third key consideration, the text of Article 3 itself does not have any temporal limit, nor does it limit its application to cases of prolonged detention. Article 3 extends the right of juridical personality to “[e]very person,” with no mention of any specific situation in which the right applies. There is no time element to the right; that is, no specific duration of removal from protection which constitutes a violation. It is thus immaterial whether a person is not recognized under the law for several hours or several years, because both would be a violation of his right to juridical personality. The length of time during which the person was not recognized would go towards the severity of the violation and the entitled damages, but not towards the existence of a violation itself, which could be demonstrated merely by the deprivation of capacity to exercise rights under the Convention.

35. Fourth, the State must not only give everyone juridical recognition but must also guarantee that conditions are such that this recognition extends to all persons. In the Case of the Sawhoyamaxa Indigenous Community v. Paraguay, this Court found a violation of Article 3 where there was no registration or official documentation of the existence of several members of an indigenous tribe.\(^\text{40}\) The Court held that “[t]he State has a duty to provide the means and legal conditions in general, so that the right to personality before the law may be exercised by its holders.”\(^\text{41}\) The Court reinforced the responsibility of the state to ensure that circumstances are such that individuals are able to effect their position with respect to the law.

36. Fifth, Article 3 protections require more than just giving an identity or identifying an individual because recognition of juridical personality is inherent in many other rights. The right


\(^{40}\) IACHR, Case of the Sawhoyamaxa Indigenous Community v. Paraguay, 29 March 2006, ¶187.

\(^{41}\) Id. at ¶189.
requires something more of the State, as noted in Case of Bámaca-Velásquez v. Guatemala.\footnote{IACHR, Case of Bámaca-Velásquez v. Guatemala, 25 November 2000, ¶179.} The right to juridical personality not only involves recognition but also bestows upon the individual an ability to exercise rights. Enjoyment of many, if not all human rights, requires more on the part of the State than mere recognition.

37. Sixth, the duty by a State to provide de jure and de facto juridical recognition is even greater, if possible, in the case of persons in situations of vulnerability. Thus, this Court, in Sawhoyamaxa, held that “[s]pecially, the State is bound to guarantee to those persons in situations of vulnerability, exclusion, and discrimination, the legal and administrative conditions that may secure for them the exercise of such right, pursuant to the principle of equality under the law.” \footnote{Sawhoyamaxa, supra note 40, at ¶189.} Aliens are by definition a vulnerable group. Illegal aliens are likely even more vulnerable. Given the well-documented widespread discrimination against Haitians and more specifically, Haitian migrant workers by the Dominican Republic, they certainly should be considered a particularly at-risk group deserving of enhanced protection.

38. If these tests are then applied to the facts in the “Guayabin Massacre”, it is evident that a violation of Article 3, as well as the interrelated rights in Articles 5(2) and 11, occurred when the survivors of the accident were detained and subsequently expelled from the Dominican Republic without being identified, processed, notified of charges, or having any inquiry made as to their legal status. The State has proffered little information about the treatment of the survivors after the accident. The admissibility report notes the petitioners’ allegations that they were arbitrarily detained at centers in Montecristi and Dajabón. \footnote{Inter-American Commission on Human Rights, Nadège Dorzema et al. v. Dominican Republic, Report No 95/08, Petition 1351-05, Admissibility, 22 December 2008, ¶12.} The petitioners allege that they were not informed of the reasons for their detention and Dominican authorities did not make any attempt to identify them. \footnote{Id.} 

39. As noted above, the purpose of right to juridical personality is, at a very minimum, to require states to acknowledge persons under the law. The petitioners in state custody were never identified or processed. Any obligations the state had to them, and any rights that they had were certainly not operational where the state wholly failed to recognize the persons.

40. Furthermore, the petitioners allege that subsequent to their detention, they were expelled from the Dominican Republic, “without any attempt ever made to determine their legal status by judicial or administrative means.” \footnote{Id.} Article 3 implies a positive duty on States to ensure that juridical personality is protected. This Court has further found that enhanced protection must be given to vulnerable groups such as indigenous persons; migrants as a group are susceptible to the same abatement of rights and should be granted such enhanced protection as well.

41. If enhanced protection is determined to be inappropriate by the Court, even the standard level of protection guaranteed by Article 3 is absent in the “Guayabin Massacre” case as illustrated by the complainants’ detention and expulsion without any inquiry into the reasons for their presence or their status under the law. The Dominican authorities did not investigate whether the individuals were lawfully or unlawfully present in the Dominican
Republic, their reasons for entering the Dominican Republic, how long they planned on staying and for what purpose, what the justification for expulsion was, or what might happen to the individuals upon expulsion. This case clearly illustrates a violation of the “right to juridical personality”.

42. If the Court does not find a violation of Article 3 with respect to the Dominican Republic’s treatment of the survivors of the Guayabin Massacre, it will be tantamount to letting Article 3 fall by the wayside. Given the circumstances of the petitioners’ detention and expulsion, the Court would be in line with its prior jurisprudence in holding that the State is responsible for ensuring that individuals may exercise their rights with respect to the law, and did not do so in this case. It would also have an occasion to expand on what the “right to juridical personality” exactly entails. Given the paucity of international jurisprudence and legal scholarship on the point, this could be a critical contribution to the human rights edifice.

PART III – VIOLATION OF THE RIGHT TO CONSULAR INFORMATION AND NOTIFICATION

I. Introduction

43. The case of the “Guayabin Massacre” raises potential violations not only of Articles 8 and 25 of the American Convention on Human Rights (hereinafter American Convention), which have been raised by the Commission and the Victims’ representatives, but also of the Vienna Convention on Consular Relations (hereinafter VCCR), and in particular the right to be informed of the right to consular assistance and the right to have the state of nationality’s consular authorities notified, contained in Article 36 of said convention. This portion of the brief examines the link between Articles 8 and 25 of the American Convention and Article 36(1) of the VCCR in the context of the Dominican Republic’s actions in the “Guayabin Massacre”.

44. While the Inter-American Court does not have subject matter jurisdiction over the VCCR in the context of a contested case this section argues that the Court should inquire into its violation because some of the rights contained within the VCCR (to wit Article 36) are integral to the functionality of both Article 8 and 25 of the American Convention. It is argued that the relevant provisions of these two treaties are inseparable.

II. Article 8 and 25 of the American Convention, and Article 36 of the Vienna Convention on Consular Relations

II.A. Article 8 of the American Convention

45. Article 8 of the American Convention requires that States afford persons the right to a fair trial. The relevant text of Article 8 provides:

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

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

   a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
   b. prior notification in detail to the accused of the charges against him;
   c. adequate time and means for the preparation of his defense;...

46. At its core, Article 8 requires that courts conform to standards of due process, which entails such fundamental protections as: notice of charges, reasonable time to prepare defenses, equality-of-arms, and judicial impartiality and independence. Due process is a gateway right, a fundamental right that facilitates the protection of many other human rights. For instance, due process guarantees allow defendants to adequately challenge the allegations against them and to aid them in extricating themselves from state detention or imprisonment.

47. Indeed, due process guarantees are so crucial that they not only apply in cases of a criminal nature, but also in civil cases and other adjudicative proceedings, including proceedings leading to the expulsion of aliens. The text of Paragraph 1 of Article 8 is unambiguous on this point: “...any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature...” As this Court held in the Advisory Opinion 18 on the Juridical Condition and Rights of the Undocumented Migrants:

   “…the Court has observed that the list of minimum guarantees of due legal process applies when determining rights and obligations of ‘civil, labor, fiscal or any other nature.’ This shows that due process affects all these areas and not only criminal matters.”

49 Id. at ¶1.
48. While Article 8 applies to any detention, no matter the legal grounds, detention due to criminal offences are afforded even more vigorous guarantees. Article 8(2), which applies to “...every person accused of a criminal offense” includes the right to be presumed innocent, the right of a translator, the right to prior notification of charges, adequate time to mount a defense, the right to counsel, the right to examine witnesses, the right to not testify against oneself, and finally the right to an appeal.51

49. The survivors of the “Guayabin Massacre” received neither any basic due process protections, nor any heightened due process guarantees afforded in criminal cases, because the Dominican Republic allegedly expelled them without any attempt in determining their legal status through judicial or administrative means.52

50. Section (a) and Section (c) of Paragraphs 2 of Article 8 of the American Convention are particularly significant in the context of the arrest of aliens for they provide for: “a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court”; and “c. adequate time and means for the preparation of his defense”. Consular notification, required by the VCCR, enables precisely the exercise of these rights. Consular authorities, if notified, can provide translators, and more importantly a consular official can aid the defendant in getting in touch with legal defense.

II.B- Article 25 of the American Convention

51. Article 25 of the American Convention addresses the fundamental right to have judicial protection:

“1. Everyone 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, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:
   a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
   b. to develop the possibilities of judicial remedy; and
   c. to ensure that the competent authorities shall enforce such remedies when granted”.53

52. This article provides for broad judicial protections that demand prompt and effective recourse before a competent court or tribunal.54 States must provide effective judicial

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51 American Convention on Human Rights, supra note 48, Art. 8.2(a-g).
52 Nadège Dorzema, supra note 44, at ¶12
54 Burgorgue-Larsen, supra note 47, at 648. This right of access to a court of law to determine the propriety for detention is a fundamental right of “profound importance.” See, e.g., International Covenant on Civil and Political Right article 14.1(b), supra note 3, ¶12, 648.
remedies. When a State does not allow victims access to an effective remedy prior to expulsion, then such a remedy, while perhaps technically available, is nonetheless de facto unavailable.

53. Arguably, an alien cannot have effective recourse if she is not afforded consular notification rights for the same reasons why lack of consular notification is also a violation of Article 8. Often violations of Articles 8 and 25 are simultaneous and indistinguishable because due process is dependent on there being effective recourse. 55

II.C - Article 36 of the Vienna Convention on Consular Relations

54. Article of 36(1) of the Vienna Convention on Consular Relations reads:

“Communication and contact with nationals of the sending State. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:

I. consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State;

II. if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph;

III. consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in


55 Some judges believe these articles are inextricably intertwined, notably Judge Cançado-Trindade makes this argument in paragraph 22 in his Separate Opinion in Lopez Alvarez v. Honduras. Id. at 647. Yet others argue that they can be delimited, such as Judge Sergio Garcia Ramirez, who argues as such in a Separate Opinion in paragraph 11 in Escue Zapata v. Colombia. Id.
prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.”

57. In short, the text of the VCCR, most crucially subsection (b), imposes an obligation on the authorities of the State detaining, in any manner, foreign nationals, to inform the State of nationality of the detainee of the arrest and to inform the detainee of her right to consular assistance. Facts suggest the Dominican Republic failed to do both.57

58. It should be noted that both Haiti and the Dominican Republic are party to the VCCR. The Dominican Republic ratified it on March 4th, 1964.58 Haiti ratified it on February 2nd, 1978.59 The VCCR entered into force on March 19th, 1967.60 To date it has been ratified by 173 States, including all members of the Organization of American States.61

59. There are two main reasons why it would be proper for the Court to question the Dominican Republic’s violation of the VCCR in the instant case. The first reason is that the right to consular assistance provided for in the VCCR is inextricably linked to the rights contained in Article 8 and 25 of the American Convention. Truly, one would need not to rely on the VCCR but could find a right to consular assistance already implicitly recognized in Article 8 and 25 themselves. Second, according to the Vienna Convention on the Law of Treaties, Article 8 and 25 must be interpreted also in the light of other related international treaties and the Vienna Convention on Consular relations is one such treaty that should be taken into consideration.

III. Articles 8 and 25 of the American convention and Article 36 of the VCCR are inextricably linked.

60. Our first argument is that Article 36 of the Vienna Convention on Consular Relations and Article 8 (due process) and 25 (judicial protection) of the American Convention are inextricably linked.

61. In this regard, the Inter-American Court’s Advisory Opinion 16 is paramount.62 In Opinion 16, the Court uncovered in the American Convention an expansive notion of due process and judicial guarantees that require consular notification and hence require an examination of compliance with the VCCR. Thus, the Court observed: “non-observance or

57 Nadège Dorzema, supra note 44, at ¶12.
59 Id.
60 Id.
61 Id.
62 Inter-American Commission on Human Rights, Seventh Progress Report of the Special Rapporteurship on Migrant Workers and Their Families, For the Period Between January and December 2005, Ch. V., ¶163 HhtpHH://HHiwwwwH.HHiachrHH.HHorHHgHH/HHannualrepHH/2005HHenHHgHH/HHChapHH.5HHbHHH.HHhtmH (last visited 28 January 2012).
impairment of the detainee’s right to information is prejudicial to the judicial guarantees."\(^{63}\) Again, the Court explicitly found that consular rights are among the minimum guarantees found in the rights to a fair trial: "The Court therefore believes that the individual right under analysis in this Advisory Opinion must be recognized and counted among the minimum guarantees essential to providing foreigners the opportunity to adequately prepare their defense and receive a fair trial."\(^{64}\) And again, "...the individual’s right to information, conferred in Article 36(1)(b) of the Vienna Convention on Consular Relations, makes it possible for the right to the due process of law upheld...\(^{65}\)

62. In the “Progress Report of the Office of the Rapporteur on Migrant Workers and Their Families in the Hemisphere”, the Inter-American Commission on Human Rights framed the matter of Article 8 and 25 being intertwined with the VCCR explicitly and expanded on the issue, by relying on Advisory Opinion 16, when it wrote:

"The case law of the Inter-American human rights system has determined that in addition to the fact that aliens are entitled to each of the minimum judicial guarantees recognized in Article 8 of the American Convention, they also have the right to criminal and administrative proceedings such as the minimum judicial guarantee to communicate, without delay of any kind, with their consular representative pursuant to the provisions of Article 36 of the Vienna Convention on Consular Relations. This is based on the premise that consular assistance provides a manner for the accused to defend him or herself, and this has an effect, at times a decisive one, with respect to the defendant’s other procedural rights."\(^{66}\)

63. If States have an indisputable obligation to afford all persons due process rights and minimum judicial protections, this obligation is even greater, if possible in the case of aliens and migrants. As the Court puts succinctly in its Advisory Opinion OC-18, on the Juridical Condition and Rights of the Undocumented Migrants:

"That the right to due process of law must be recognized as one of the minimum guarantees that should be offered to any migrant, irrespective of his migratory

\(^{63}\) IACHR, The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion OC-16, 1 October 1999, ¶129. Here, it is pertinent to note that the Court defines the “right to information” as: “The right of a national of the sending State who is arrested or committed to prison or to custody pending trial or is detained in any other manner, to be informed “without delay” that he has the following rights: i) the right to have the consular post informed, and ii) the right to have any communication addressed to the consular post forwarded without delay. (Article 36(1)(b) of the Vienna Convention on Consular Relations).” Id. at ¶5.

\(^{64}\) Id. at ¶122.

\(^{65}\) Id. at ¶124.

status. The broad scope of the preservation of due process encompasses all matters and all persons, without any discrimination."\(^67\)

Yet, foreign defendants may have more impediments against them in judicial proceedings due to myriad factors, such as prejudice as to national origin, race, and language barriers. Migrants may have even more difficulties and these may be exacerbated by local hostilities towards people who move to work or reside in the State. These persons need more than just the bare minimum, rather they need enhanced protection. Article 36 of the Vienna Convention on Consular Relations provides exactly that needed enhanced protection.

64. At the beginning of the 2000s, the International Court of Justice considered a set of three cases regarding alleged violations of the VCCR by the United States.\(^68\) In one of these, the LaGrand case, the Federal Republic of Germany in its memorial noted that,

“[t]he normal procedural safeguards are not adequate to overcome this disadvantage and to protect the due process rights of a foreign defendant. Art. 36 of the Vienna Convention on Consular Relations guarantees consular notification and assistance precisely because the States Parties to it recognized this inherent prejudice, and likewise recognized the critical role of consular assistance in alleviating it. Hence, the Vienna Convention requires advice to foreign nationals on the right to contact their consulate in order to enable them to have access to the resources and protection of their home country.”\(^69\)

65. The Inter-American Commission has similarly argued that foreign persons have unique vulnerabilities when it stated, “International law has recognized that detained foreign nationals may be at a disadvantage or have problems preparing their defense...”\(^70\) The Court, too, recognized that foreign defendants are at a disadvantage and it stressed that this must be corrected by “countervailing measures”, and that this is effectuated by consular notification, as the court aptly explains:

“This is why an interpreter is provided when someone does not speak the language of the court, and why the foreign national is accorded the right to be promptly advised that he may have consular assistance. These measures enable the accused to fully exercise other rights that everyone enjoys under the law. Those rights and these, which are inextricably inter-linked, form the body of procedural guarantees that ensures the due process of law.”\(^71\)

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\(^67\) Juridical Condition and Rights of the Undocumented Migrants, supra note 50, at ¶7.


\(^69\) Memorial of the Federal Republic of Germany, LaGrand Case (Germany v. the United States of America), 16 September 1999, Written Proceedings, Volume I. Section 6.42.

\(^70\) H The Right to Information on Consular Assistance, Advisory Opinion, supra note 63, at 30.

\(^71\) H Hld. H Hat ¶H120.
66. In the words of Judge Cançado-Trindade, in his concurrcence in Advisory Opinion 16 “[i]n the civitas maxima gentium of our days, it has become indispensable to protect, against discriminatory treatment, foreigners under detention, thus linking the right to information on consular assistance with the guarantees of the due process of law set forth in the instruments of international protection of human rights.”

67. It should be stressed that reading a right to consular notification in Article 8 and 25 is a matter of interpreting the American Convention in a dynamic and evolutionary way.

68. In a concurring opinion, in the same Advisory Opinion, Judge Garcia-Ramirez reminds us that due process must constantly evolve stating, “[d]ue process is never a finished product but rather a dynamic system constantly creating itself. The rights and guarantees that constitute due process are indispensable for due process. Where any one of them is lacking or diminished, there is no due process.” To further clarify, he also adds: “Every transformation gives rise to new rights and guarantees, which taken together constitute contemporary criminal due process. Thus, the increasing numbers of people migrating have triggered developments in various areas of the law, among them criminal procedure, with the introduction of the methods and guarantees needed when prosecuting aliens. Judicial development must take these new developments into account; concepts and solutions must be examined to see if they fit the emerging problems.”

69. The idea of a dynamic and evolutionary interpretive paradigm finds support in human rights scholarship, too. William Aceves intones that, “...due process is not a static concept; it is dynamic and evolutionary. International agreements must be interpreted accordingly.”

70. But, interpreting dynamic and evolving human rights treaties does not mean creating rights and duties out of thin air. The right of consular notification is not a judicial invention, but rather Judge Garcia-Ramirez states that the Court, “...merely took a right already established in the Vienna Convention on Consular Relations and made it part of that dynamic body of law that constitutes ‘due process’ in our time.”

71. In other words, the convergence and resulting synergy of human rights norms, contained in different international legal instruments, creates new human rights paradigms. This notion finds support in Judge Cançado-Trindade’s theory of the “humanization” of international law, which manifests itself in the, “Intermingling of Public International Law and Human Rights Law”. In this instant case the Court should ensure the integration of human right norms, given that many human rights are coextensive and are evolving into customary norms.

72. Id. Concurring Opinion of Judge Cançado-Trindade, at ¶34.

73. Id. Concurring Opinion of Judge Garcia-Ramirez, at 2.

74. Id.


76. The Right to Information on Consular Assistance, Concurring Opinion of Judge Garcia-Ramirez, supra note 70, at 3.

international law. Indeed, Judge Cançado-Trindade suggests that Advisory Opinion 16 has sparked a materialization of *opinio juris* with regard to consular notification being a human right inextricably linked with due process.78

71. The idea that the Vienna Convention on Consular Relations is, in this time and age, not a human rights treaty, for the benefit of individuals, but is only a treaty that provides for the reciprocal rights and duties of sovereign states is anachronistic. An analysis of the *traveaux preparatoires* of the Vienna Convention seems to suggest as much, as attested by the International Court of Justice in the *Avena* case.79 Yet, that should not be surprising. The Vienna Convention was negotiated in the early 1960s, in the early days of international human rights law. Since then, international law, and in particular international human rights law, has come a long way.

72. It could be argued that by the mid-1980s consular notification had become an individual’s human rights as opposed to a State’s right. In 1985, the UN General Assembly adopted Resolution 40/144. Article 10 of that resolution reads: “*Any alien shall be free at any time to communicate with the consulate or diplomatic mission of the State of which he or she is a national...*”80 Here, the General Assembly couches consular communication from the perspective of the alien, not of the state, and it thereby implies consular notification protects the alien, not the state of nationality. Also the resolution uses robust textual language that indicates the presence of a human right, as it intones the alien “shall be free”. Furthermore, the Resolution compounds this notion and highlights its importance by using the phrase “at any time”, thereby suggesting that the right is crucial enough to be omnipresent.

73. Ten years later, in 1995, the UN General Assembly adopted another resolution (Resolution 54/166 on the Protection of Migrants) that was even more explicit, stating:

“*The United Nations General Assembly] *[r]eiterates the need for all States to protect fully the universally recognized human rights of migrants, especially women and children, regardless of their legal status, and to provide humane treatment, particularly with regard to assistance and protection, including those under the Vienna Convention on Consular Relations, regarding the right to receive consular assistance from the country of origin...*” [emphasis added]81

Here, consular assistance is called a “right” and the General Assembly places such assistance amongst universally recognized human rights that require particular State vigilance.

74. As explained earlier, treaties, and especially human rights treaties, are not static instruments. The VCCR has unequivocally evolved to protect the human rights of individuals, as this Court clearly spelled out in Advisory Opinion 16.82 “*That Article 36 of the Vienna...*”


79 *Avena*, supra note 68, at ¶124. However, the ICJ eventually declined to decide the matter.


82 *The Right to Information on Consular Assistance*, supra note 63, at ¶84 and 87. Confirming consular communication as an individual right that concerns human rights.
Convention on Consular Relations concerns the protection of the rights of a national of the sending State and is part of the body of international human rights law.” [emphasis added] 83

75. Judge Cançado-Trindade explicitly propounded this view, but also went beyond. He suggests that the right has morphed into customary international law when he writes: “… the subjective individual right to information on consular assistance, of which are titulaires all human beings who are in the need to exercise it, has crystallized: such individual right, inserted into the conceptual universe of human rights, is nowadays supported by conventional international law as well as by customary international law.” 84

76. Scholars, such as William Aceves and Christina Cerna have also argued that the VCCR, or at least Article 36 of the VCCR, is a human rights instrument. 85

IV. Vienna Convention on the Law of Treaties, Article 31.3.c.

77. The American Convention and, for that matter, the Vienna Convention on Consular relations, should not only be interpreted according to an evolutionary and dynamic canon of interpretation. These treaties must also be interpreted not in clinical isolation but in the wider context of international law.

78. As this Court declared in Advisory Opinion 18, States must comply “…with every international instrument applicable to them.” 86 Indeed, the Vienna Convention on Law of the Treaties (hereinafter VCLT), under Article 31 (General Rule of Interpretation), provides that in interpreting treaties “…[t]here shall be taken into account, together with the context … any relevant rules of international law applicable in the relations between the parties.” 87

79. This Court has issued advisory opinions on the VCCR in two instances: Advisory Opinion 16 on The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law; 88 and Advisory Opinion 18 on The Juridical Condition and Rights of the Undocumented Migrants. 89

80. It should be recalled that both the Dominican Republic and Haiti are parties to the Vienna Convention on the Law of the Treaties. 90 The Dominican Republic ratified it on April 1, 2010. 91 Haiti ratified it on 25 August 1980. 92 The Treaty entered into force on 27 January 1980. 93

81. The International Law Commission (hereinafter ILC) has argued in favor of a systemic approach to treaty interpretation, facilitated by VCLT Article 31.3.c, in which, multiple parallel

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83 Id. at ¶2.
84 Id. Concurring Opinion of Judge Cançado-Trindade, at ¶35.
85 Aceves, supra note 75, at 562; Cerna, supra note 77, at 50. Aceves and Cerna were assessing the case: IACHR, Cesar Fierro v. United States, Case 11.331, Report No. 99/03, OEA/Serv/L/V/II.114, doc. 70 rev. 2. 37 (2003).
86 Juridical Condition and Rights of the Undocumented Migrants, supra note 50, ¶171.
88 See Right to Information on Consular Assistance, supra note 70.
89 See Juridical Condition and Rights of the Undocumented Migrants, supra note 50.
91 Id.
92 Id.
93 Id.
treaties support each other: “The doctrine of “treaty parallelism” addresses precisely the need to coordinate the reading of particular instruments or to see them in a “mutually supportive” light.” In other words, the ILC argues that treaties that have interconnected principles necessitate a coordinated interpretation. More crucially, the ILC even indicates that this doctrine of treaty parallelism, which finds authority and practical application in VCLT Article 31.3.c, can even enable courts to interpret treaties that they do not technically have jurisdiction over: “This means that although a tribunal may only have jurisdiction in regard to a particular instrument, it must always interpret and apply that instrument in its relationship to its normative environment - that is to say ‘other’ international law. This is the principle of systemic integration to which article 31 (3) (c) VCLT gives expression.”

82. Thus, Article 31.3.c of the Vienna Convention on the Law of Treaties would, by itself, provide this Court a sufficiently large basis to enable it to proceed with an inquiry into a violation of the rights contained in the Vienna Convention on Consular Relations. The Court’s jurisdiction ratione personae and loci rests on the ratification, by the Dominican Republic, of the American Convention and its declaration of acceptance of the Courts’ jurisdiction, but its jurisdiction ratione materiae could be expanded by relying on this fundamental canon of interpretation. It would not be unprecedented. The Inter-American Commission has relied on the VCCR to interpret the scope of the American Declaration of Human Rights.

PART IV – VIOLATION OF THE PROHIBITION ON COLLECTIVE EXPULSION

I. Introduction

83. This section concerns the collective expulsion of the survivors of the “Guayabin Massacre” by Dominican authorities from the Dominican Republic. First, we will discuss, the scope of the obligations that States have, as a matter of customary international law towards aliens, including illegal aliens. Second, we will address the prohibition of collective expulsion of aliens and its applicability to the present case.

84. Although Article 22.9 of the American Convention on Human Rights explicitly states a prohibition against collective expulsion, to date no State has appeared before the Inter-American Court to answer for a violation of this specific provision. The Inter-American Court has had the occasion to dwell on the scope of the prohibition of collective expulsions only in the context of an annual report, and while deciding on provisional measures in a case pending before the Commission. Therefore, this case presents an opportunity for the Court to clarify the scope and limitations of the Article 22.9 in the context of a binding decision.

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95 Id. at 212-213.
96 IACHR, Ramon Martinez-Villareal, Case No. 11.753, Report No. 52/02, Merits, October 10, 2002, ¶57-87.
II. Relevant Facts

85. The survivors of the “Guayabin Massacre” allege that they were summarily rounded up and detained. During this detention they allege they were not offered reasons for their detention nor were they brought before a judge. They further allege that they were expelled from the country without a determination of individual status or any given due process. The Dominican Republic, in its briefs, has not offered a divergent version of the detention. Additionally, the Dominican Republic has proffered no evidence to counter the circumstances and conditions of the collective expulsion alleged by the petitioners.

III. Balancing the sovereign State’s right to admit or not admit and to expel or not expel aliens against the requirements of international human rights law

86. Under international law, any State can, at any moment, if it deems it necessary in the interest of its tranquility or domestic or international security, or of the health of its inhabitants, admit or not admit, expel or not expel aliens who wish to enter or who reside in its territory, as well as to impose conditions on their entry or residence. However, this fundamental State right must be balanced with regard and respect to the fundamental rights of every person. The act of expelling aliens is always an expression of state sovereignty, but one that must take place at all times in respect of the fundamental principles of human rights and international law.

IV. The inherent, but non-absolute, right of States

87. The State’s right to expel aliens from its territory is uncontested in international law. In a very comprehensive study of the expulsion of aliens in international law, released in 2006, the International Law Commission concluded that “the right to expel is not granted to the State by external rule; it is a natural right of the State emanating from its own status as a sovereign legal entity with full authority over its territory”. The ILC study covered the relevant practice.

99 Nadège Dorzema, Admissibility Report, supra note 44, at ¶12.
100 Id.
101 Id.
102 Id. at ¶20-29.
of dozens of international organizations and practice of almost 70 States. Furthermore, this State’s right has been affirmed by regional human rights bodies.

88. In *Moustaquim v. Belgium*, the European Court of Human Rights reaffirmed a State’s right to expel aliens, stating:

“... the Contracting States’ concern to maintain public order, in particular in exercising their right, as a matter of well-established international law and subject to their treaty obligations, to control the entry, residence and expulsion of aliens.”  

89. Additionally, the African Commission on Human and People’s Rights has stated:

“The Commission does not wish to call into question nor is it calling into question the right of any State to take legal action against illegal immigrants and deport them to their countries of origin, if the competent courts so decide.”

90. Moreover, the Institute du Droit International has stated:

“Whereas for each State, the right to admit or not admit aliens to its territory or to admit them only conditionally or to expel them is a logical and necessary consequence of its sovereignty and independence”

91. Yet, the right to admit or not admit aliens to its territory or to admit them only conditionally or to expel them is not absolute. Like all rights and powers of States, they can be exercised only in conformance with international law. The validity of an expulsion must be determined in the light of the State’s obligations, whether they derive from custom, treaties or general principles of law. More specifically, the Institute du Droit International has stated that the exercise of the right of expulsion is subject to certain restrictions, including the principle that the:

“Expulsion must be carried out with full consideration, in accordance with the requirements of humanity and respect for acquired rights”.

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107 *Id.* at 3-4.
92. In its Declaration of Principles of International Law on Mass Expulsion, the International Law Association has stated:

“The power of expulsion must be exercised in conformity with the principles of good faith, proportionality and justifiability, with due regard to the basic human rights of the individuals concerned.”  

93. The rules of international law which govern the right of States to expel aliens include the substantive as well as the procedural conditions for the lawful expulsion of aliens. Moreover, although expulsion of individual aliens is a sovereign States’ right, collective expulsions of aliens are always considered to be violation under contemporary international law.  

V. General Limitations to the Right to Expel Aliens  

94. The limitations of the right of a State to expel aliens have evolved over the centuries. In the nineteenth and early twentieth century, the right of expulsion was primarily limited by general standards relating to the prohibition of abuse of rights, the principle of good faith, the prohibition of arbitrariness, and the minimum treatment of aliens. Moreover, since the mid-twentieth century, international human rights law has further limited the right of a State to expel aliens, including illegal aliens. These can be summarized by the duty of a State not to discriminate and the principle of legality.  

95. Moreover, contemporary international law has specific requirements, both procedural and substantive, regulating the expulsion of aliens. Thus, the State has a duty to provide the grounds for expulsion. Illegally entering territory and violating the laws of the State entered are valid grounds for expulsion, but the State has a duty and must provide justification for the expulsion. The justification must be provided not only to the State of nationality of the aliens expelled, but “...the expelling State would also appear to have a duty to provide the reason for the expulsion to the individual alien. This notification would appear to be an essential element of the procedural requirements for the lawful expulsion of an alien....”  

96. Also, the expulsion of an alien must comply with necessary procedural requirements.  

“[T]he right to expel or deport, like the right to refuse admission, must be exercised in conformity with generally accepted principles of international law, especially international human rights law, both substantive and procedural, and

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114 International Law Commission, Third Report, supra note 104, at 11.
116 Id. at ¶745-755.
117 Id.
118 Id. at ¶326-333 and ¶380-391.
119 Id. at ¶311.
the applicable international agreements, global, regional and bilateral. Consequently, in exercising the right to expel or deport, a State must observe the requirements of the due process of law, international and domestic (in accordance with its laws and regulations); its officials must not act arbitrarily or abuse the powers granted to them by their national law, and in all instances they must act reasonably and in good faith.120

Procedural guarantees that States must respect at all times include the prohibition of discrimination,121 right to receive notice of expulsion proceedings;122 minimum conditions of detention during proceedings;123 right to submit reasons against expulsions;124 right to a hearing;125 right to be present;126 right to consular assistance;127 right to counsel, including legal aid;128 right to translation and interpretation;129 a reasoned decision that is duly notified;130 a right to a review of the decision to expel and the state of destination.131 Finally, there are minimum requirements for the way the decision to expel is implemented, including a general right to humane treatment, and property rights that must, at all times, be protected.132

97. In sum, while a State has a broad discretionary right to expel aliens from its territory when their continuing presence is contrary to its interests, this right is subject to several limitations and requirements as a matter of customary international law.

VI. Collective Expulsion is Prohibited under International Law.

98. In contrast to the expulsion of individual aliens, which the State can always effectuate (albeit subject to several limitations and requirements, which we have just described), the collective expulsion of a group of aliens as such, even a small group, is contrary to the very notion of the human rights of individuals and is therefore absolutely prohibited.

99. Collective expulsion is explicitly prohibited by a number of human rights legal instruments, both at the universal and the regional level.

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121 ILC, Expulsion of Aliens, supra note 115, at ¶604-606.
122 Id. at ¶607.
123 Id. at ¶608-611.
124 Id. at ¶612-624.
125 Id. at ¶619-623.
126 Id. at ¶624.
127 Id. at ¶625-631.
128 Id. at 115 ¶632-643.
129 Id. at ¶644-646.
130 Id. at ¶647-656.
131 Id. at ¶657-689.
132 Id. at115 ¶697-744.
VI.A- Legal Instruments at the Universal Level

100. The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families expressly prohibits the collective expulsion of such individuals. Article 22, paragraph 1, provides as follows: “Migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.”

101. Additionally, in the Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, the General Assembly has stated as follows: “Individual or collective expulsion of such aliens on grounds of race, colour, religion, culture, descent or national or ethnic origin is prohibited.”

102. Moreover, collective expulsion is implicitly prohibited by other human rights treaties which limit the expulsion of aliens to individual cases, including the International Covenant on Civil and Political Rights. While Article 13 of the ICCPR does not contain an explicit prohibition against collective expulsion, the Human Rights Committee has expressed the view that such expulsion would be contrary to the procedural guarantees for individual aliens. In its General Comment No. 15 concerning the position of aliens under the Covenant, the Human Rights Committee stated as follows:

“Article 13 directly regulates only the procedure and not the substantive grounds for expulsion. However, by allowing only those carried out “in pursuance of a decision reached in accordance with law”, its purpose is clearly to prevent arbitrary expulsions. On the other hand, it entitles each alien to a decision in his own case and, hence, article 13 would not be satisfied with laws or decisions providing for collective or mass expulsions. This understanding, in the opinion of the Committee, is confirmed by further provisions concerning the right to submit reasons against expulsion and to have the decision reviewed by and to be represented before the competent authority or someone designated by it. An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one. The principles of article 13 relating to appeal against expulsion and the entitlement to review by a competent authority may only be departed from when ‘compelling reasons of national security’ so require. Discrimination may not be made between different categories of aliens in the application of article 13.”

103. The UN Committee on the Elimination of Racial Discrimination has also indicated that the collective expulsion of aliens should be prohibited. In its General Recommendation 30, the

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133 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, UNGA Res 45/158, 18 December 1990, Art. 22.1. This Convention has neither been signed nor ratified by the Dominican Republic or Haiti.

134 Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, United Nations General Assembly, Resolution 40/144, 13 December 1985, ¶7.

135 Committee on the Elimination of Racial Discrimination, General Comment No. 15: The Position of Aliens under the Covenant, 11 April 1986, ¶10.
Committee recommended that States Parties to the International Convention on the Elimination of All Forms of Racial Discrimination:

“Ensure that non-citizens are not subject to collective expulsion in particular in situations where there are insufficient guarantees that the personal circumstances of each of the persons concerned have been taken into account.”¹³⁶

104. Finally, the Special Rapporteur of the United Nations’ OHCHR on the rights of non-citizens has also indicated that the collective expulsion of aliens, as a group, is prohibited in the absence of the consideration of each particular case. In his final report, the Special Rapporteur stated as follows:

“Any measure that compels non-citizens, as a group, to leave a country is prohibited except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual non-citizen in the group.”¹³⁷

VI.B- Regional Level- Americas

105. The American Convention on Human Rights expressly prohibits the collective expulsion of aliens. Article 22, paragraph 9, provides as follows: “The collective expulsion of aliens is prohibited”.¹³⁸

106. Additionally, the prohibition of collective expulsion was reiterated in the Santiago Declaration on Migratory Principles, adopted by the Ministries of Interior of Mercosur and Associates States in 2004.¹³⁹

VI.C- Regional Level- Europe

107. Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms also expressly prohibits collective expulsion. Article 4 provides as follows: “Collective expulsion is prohibited.”¹⁴⁰

108. The Charter of Fundamental Rights of the European Union explicitly prohibits collective expulsions. Article 19, paragraph 1, provides as follows: “Collective expulsions are prohibited.”¹⁴¹

¹³⁸ American Convention on Human Rights, supra note 3, Art. 22.9.
¹³⁹ Santiago Declaration on Migratory Principles, adopted by the Ministries of Interior of Mercosur and Associates States, Santiago de Chile, (17 May 2004). Declaration X condemns: “xenophobic practices, mass or collective deportations, and detentions with no legal basis”. [Spanish original, translated into English]
VI.D- Regional Level- Africa and Middle East

110. Article 12.5 of the African Charter of Human and Peoples’ Rights states, “the mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.”

VII. International Jurisprudence

111. As mentioned above, both the European Court and the Commission of Human Rights and the Inter-American Commission and Court of Human Rights, have stated explicitly that collective expulsions are illegal.

VII.A- International Jurisprudence- Americas

112. Although no precedent exists that specifically addresses the prohibition of collective expulsion contained in Article 22.9 of the American Convention, in the past the Inter-American Commission on Human Rights has stated concerns that the Dominican Republic has violated this article.
113. In 1991 the President of the Dominican Republic, Joaquin Balaguerb ordered in Directive 233-91, the immediate expulsion of all undocumented Haitians less than 16 years old and more than 60 years old. As a result, an estimated 35,000 Haitians were subsequently expelled without legal proceedings. In response to these expulsions, the Inter-American Commission on Human Rights sent a cable to the Dominican government charging it with violating Article 22.9. The cable stated:

“The Inter-American Commission on Human Rights believes that the collective deportation of Haitians in the Dominican Republic is a violation of the human rights upheld in Article 22.9 of the American Convention on Human Rights, which states that: “The collective expulsion of aliens is prohibited.” The Dominican Republic is a State party to that Convention.”

142 Arab Charter, supra note 11, Art. 26.2.
143 Although, the Inter-American system and the European system refer to “collective expulsions” and the African Charter refers to “mass expulsions”, it is submitted that both mass and collective expulsions are standards that denote related aspects of the same phenomenon. See section entitled “Collective Expulsions”. African Charter, supra note 20, Art. 12.5.
145 Id. at Section 2(a), ¶7.
114. Additionally, the Inter-American Commission was concerned with the fact that at no point during the expulsion process, were any of the affected parties given a formal hearing with minimum procedural guarantees. 146

115. Another instance of collective expulsions, again from the Dominican Republic, is currently being heard within the Inter-American system. 147 In 1999, a petition was filed with the Inter-American Commission alleging the collective expulsion of thousands of Haitians by the Dominican government. 148 The Commission requested the Court take provisional measures to stop these alleged violations. During the proceedings before the Court, the Inter-American Commission argued that the Dominican government:

“[M]ust recognize the right of legal aliens not to be deported, except by a decision based on the law, and must prohibit the collective expulsion of aliens whether legally or not in the country. In like manner, the immigration policy must ensure, for each case, an individual decision with the guarantees of the due process; it must respect the right to life, to physical and psychological integrity and to the family, and the right of children to obtain special protection measures. Lastly, the implementation of such policy cannot be allowed to result in cruel, inhuman or degrading treatment, nor in discrimination for reasons of race, color, religion or sex...” 149

116. The Commission further noted that "expulsions" are executed by way of collective raids, "...without any legal procedure to adequately identify the nationality of "expelled" people, nor their migratory status nor their family ties; they are simply separated from their homes, without warning, without letting them take their belongings. Migration authorities select people to be deported on the basis of the color of their skin." 150

117. To this end the Commission required the adoption of precautionary measures by the Dominican government that appear to have been disregarded, and the Commission noted that the Dominican government continues to summarily and arbitrarily deport individuals on a discriminatory basis without due process. 151

118. Based on these arguments the Inter-American Court decided that the petitioners affected by the expulsion were to be allowed safe return back to the Dominican Republic. Furthermore, it decided that the Dominican Republic must submit information in regards to the mass expulsions occurring in the Haitian “bateye” 152 communities. 153 And although the case

146 Id. at Section 4(b), ¶11.
147 Inter-American Commission on Human Rights, Benito Tide-Méndez, supra note 98, at ¶1.
148 Id.
150 IACHR, Benito Tide-Méndez et al. v. Dominican Republic (Matter of Haitians), Order of the President of the Court (September 14, 2000), ¶2(d).
151 Inter-American Commission on Human Rights, Benito Tide-Méndez, supra note 147, at ¶11(b). The Commission also noted “[t]his practice, which is carried out arbitrarily, in summary fashion, and without guarantees, continues to be aimed against individuals whose skin color is “black.”
152 Id. at ¶22, “bateye” refers to frontier communities made up of Haitian nationals and Dominicans of Haitian-origin on the Haitian-Dominican border.
has not been heard before the Court, it has consistently reminded the Dominican government to uphold the rights of the petitioners affected by these mass expulsions, which appear to have been largely ignored.\textsuperscript{154}

\textbf{VII.B- International Jurisprudence- Europe}

119. The European Court of Human Rights has had the opportunity, on a few rare occasions, to decide on violations of the obligation not to expel aliens collectively contained in Protocol 4, Article 4 of the ECHR. These few cases include: 	extit{Conka v. Belgium, Vedran Andric v. Sweden}, and 	extit{Anguelova v. Bulgaria}. Based on the dearth of cases even in Europe, violations of collective expulsion appear to be seldom invoked. This is likely attributable to the fact that it is a simple and crystal clear prohibition that leaves little room for a State’s margin of appreciation and jurisprudential elaboration. Nowadays, European States rarely engage in a violation of Protocol 4, Article 4.

\textbf{VIII. The Scope of the Prohibition of Collective Expulsion}

120. Under contemporary international law, we are in the presence of collective expulsion whenever there is: (1) the expulsion of a group (two or more individuals) of aliens; (2) there has been no individual review, or the review has been just perfunctory, not objective or reasonable.\textsuperscript{155} Moreover, (3) the grounds on the basis of which the State decides to expel the alien, or the way in which expulsion is carried out, are immaterial in the determination of whether a “collective expulsion” took place; (4) the State has the burden of proving beyond a reasonable doubt that collective expulsion did not occur; and (5) collective expulsion of aliens in violation of the principle of non-discrimination is an aggravating circumstance.

\textbf{IX. Definition of “Collective Expulsion”}

121. Whenever aliens, including illegal aliens, are expelled as a group, without consideration for the circumstances of each individual, we are in the presence of collective expulsion. To use the words of the European Commission of Human Rights: “\textit{Collective expulsion is to be understood as any measure by the competent authorities compelling aliens, as a group, to leave

\textsuperscript{153} \textit{Id.} at ¶22.
\textsuperscript{154} See generally sections titled “resuelve” or “decides” in the following: IACHR, \textit{Benito Tide Méndez}, Order of the President of the Court, \textit{supra} note 150; Inter-American Commission on Human Rights, \textit{Benito Tide-Méndez, supra} note 1478; IACHR, \textit{Benito Tide-Méndez}, Order of the Court, \textit{supra} note 149; IACHR, \textit{Benito Tide-Méndez et al. v. Dominican Republic (Matter of Haitians)}, Order of the Court (November 12, 2000); IACHR, \textit{Benito Tide-Méndez et al. v. Dominican Republic (Matter of Haitians)}, Order of the Court (May 26, 2001); IACHR, \textit{Benito Tide-Méndez et al. v. Dominican Republic (Matter of Haitians)}, Order of the Court (February 2, 2006); IACHR. \textit{Benito Tide-Méndez et al. v. Dominican Republic (Matter of Haitians)}, Order of the Court (July 8, 2009).
a country.... »156
122. The European Court of Human Rights has confirmed the distinction between collective expulsion and individual expulsion in its subsequent case-law.157
123. Under contemporary international law it seems that an “expulsion” is deemed to be “collective” when it entails the expulsion of a plurality of individuals, in one single episode, as opposed to just one single person. However, exactly how many individuals constitute a collective expulsion has not been determined. In this regard, the International Law Commission, in its seminal 2006 study, observed:

“In theory, the prohibition of collective expulsion could be violated by expelling a small group of aliens (e.g. two or more) who did not receive individual consideration of their case. In practice, collective expulsion has usually occurred in relation to several aliens.”158

124. In the “Guayabin Massacre” case, the facts, as determined by the Commission and uncontested by the State, suggest that thirteen individuals were expelled collectively. This seems to be a sufficiently large number to meet whatever threshold, theoretical or practical, international law has for collective expulsions.
125. It should be noted that sometimes the term “mass expulsions” is used to refer to collective expulsions. For instance, the African Charter of Human and Peoples’ Rights, Article 12.5, states “the mass expulsion of non-nationals shall be prohibited.... »159

X. Lack of Individual Review

126. When a group of aliens has been expelled without individual review, or the review is just perfunctory, not objective or reasonable, we are in the presence of a collective expulsion.
127. In interpreting Article 4 of Protocol No 4, the European Court of Human Rights has distinguished between the collective expulsion of aliens and the expulsion of one or more individual aliens as follows:

“The Court finds that collective expulsion is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure

157 Id. ECHR, Conka v. Belgium, at ¶59.
158 ILC, Expulsion of Aliens, supra note 115, at ¶990.
159 African Charter, supra note 20, Art. 12.5. Although, the Inter-American system and the European system refer to “collective expulsions” and the African Charter refers to “mass expulsions”, it is submitted that both mass and collective expulsions are standards that denote related aspects of the same phenomenon. There is a subtle but material difference between “collective expulsion” and “mass expulsion. Collective expulsion involves (1) the expulsion of a group of aliens and (2) the absence of individual review. Mass expulsion involves (1) the expulsion of a group of aliens and (2) this group is a homogeneous national, racial, ethnic or religious group. However, the difference might have minimal practical import. Indeed, Henckaerts argues that all cases that have been examined under either mass expulsion or collective expulsion standards would have been found to violate the other standard also. Henckaerts, supra note 155, at 18-19.
is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.... [emphasis added].

128. Moreover, when “each person concerned has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis ...”, the fact that a number of aliens receive similar decisions does not lead to the conclusion that collective expulsion has occurred.\(^{161}\) However, *Conka v Belgium*, the ECHR cited a series of factors that cast doubt on the legality of expulsions of a Slovaks being expelled from Belgium:

“[F]irstly, prior to the applicants' deportation, the political authorities concerned had announced that there would be operations of that kind and given instructions to the relevant authority for their implementation...; secondly, all the aliens concerned had been required to attend the police station at the same time; thirdly, the orders served on them requiring them to leave the territory and for their arrest were couched in identical terms; fourthly, it was very difficult for the aliens to contact a lawyer; lastly, the asylum procedure had not been completed.”\(^{162}\)

**XI. Grounds for Expulsion and the Way Expulsion is Implemented are Immaterial**

129. The grounds on the basis of which the State decides to expel the alien are immaterial in the determination of whether a “collective expulsion” took place. It does not matter that the State might deem the continuing presence of the alien contrary to its interests. As the ILC observed, “…the collective expulsion of a group of aliens does not take into account the consequences of the presence, the grounds and other factors affecting the expulsion...”\(^{163}\)

130. It does not matter that the aliens in question were legal or illegal.\(^{164}\) It does not matter whether they were migrant workers or entered the State’s territory with goals other than working or studying.\(^{165}\)

131. Finally, the procedural requirements for the expulsion, or the rules relating to the implementation of the expulsion decision with respect to a single one of these aliens, do not matter either.\(^{166}\)


\(^{161}\) ECHR, *Case of Vedran Andric v. Sweden*, supra note 156, at ¶1.

\(^{162}\) ECHR, *Case of Conka v. Belgium*, supra note 157, at ¶62.

\(^{163}\) ILC, Expulsion of Aliens, supra note 115, at ¶1990.

\(^{164}\) *Id.* at ¶750-751.

\(^{165}\) *Id.* at ¶779, 789, and 804-806.

\(^{166}\) “...the procedural requirements for the expulsion or the rules relating to the implementation of the expulsion decision with respect to a single one of these aliens. The decision concerning expulsion is made with respect to the group of aliens as a whole. The procedure is conducted with respect to the group of aliens as a whole. The implementation of the decision is carried out with respect to the group of aliens as a whole. The collective expulsion of a group of aliens cannot, by definition, comply with the limitations or requirements that apply to the expulsion of an individual alien....” *Id.* at ¶1990.
XII. **Burden of Proof**

132. Under contemporary international law, the State has the burden of proving beyond a reasonable doubt that the expulsions of persons were in fact made on an individual basis and an instance of collective expulsion did not occur.

133. In *Conka v. Belgium*, the ECHR found that Belgium had violated the prohibition against collective expulsions by deporting a group of Slovak nationals without affording them due process and a reasonable and objective individual examination of their personal circumstances. The ECHR noted that although each member of the group of Slovak nationals had an individual review citing personal circumstances in consideration of their deportation, this evidence proffered by the Belgian government was insufficient to rebut the presumption that a collective expulsion had occurred due to the large number of deportations that were carried out in the same manner. In other words, the ECHR placed the onus on Belgium to prove that a collective expulsion had not occurred. In finding that collective expulsion had occurred the ECHR cited a series of factors that cast doubt the expulsions of the group were individual:

> “Firstly, prior to the applicants' deportation, the political authorities concerned had announced that there would be operations of that kind and given instructions to the relevant authority for their implementation...; secondly, all the aliens concerned had been required to attend the police station at the same time; thirdly, the orders served on them requiring them to leave the territory and for their arrest were couched in identical terms; fourthly, it was very difficult for the aliens to contact a lawyer; lastly, the asylum procedure had not been completed.”\(^{167}\)

134. The European Court of Human Rights confirmed that the burden of proof is on the State contesting the violation in *Anguelova v Bulgaria* stating:

> “Reliance on inferences, legal presumptions and a shift in the onus of evidence also proved decisive in the recent Conka case, in which the Court, rather than requiring from the applicants proof beyond reasonable doubt that their expulsion was in pursuance of a collective expulsion policy, found a violation by starting from the opposite end of the syllogism: “The procedure followed [by the State authorities] did not enable it [the Court] to eliminate all doubt that the expulsion might have been collective.”\(^{168}\)

\(^{167}\) ECHR, *Case of Conka v. Belgium*, supra note 157, at ¶162.

135. In sum, under contemporary international law the burden of proof is squarely on the State and the evidentiary threshold is very high, being set at “beyond reasonable doubt”.

XIII. Discrimination is an Aggravating Circumstance

136. The UN General Assembly has recognized that the individual or collective expulsion of aliens in violation of the principle of non-discrimination is prohibited. In the Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, the General Assembly stated as follows: “Individual or collective expulsion of such aliens on grounds of race, colour, religion, culture, descent or national or ethnic origin is prohibited.”

137. The African Charter of Human and Peoples’ Rights, Article 12.5, echoes this distinction by stating that “the mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups.”

138. It does not matter whether the decision to expel collectively the aliens was based on a discriminatory intent in the determination of whether a “collective expulsion” took place. If anything, discriminatory intent might be regarded as an aggravating circumstance.

139. In that regard, it should be noted that in the present case, it seems that the victims of the “Guayabin Massacre” have been subject not only to collective expulsion, but also that their expulsion has been essentially justified on the basis of prohibited discriminatory grounds (namely, national origin, racial and ethnic grounds). There appears to be a continuing pattern of discrimination by the Dominican government against Haitians.

CONCLUSION

140. In sum, amici respectfully submit that in the present case there appears to have been violations of the right to juridical personality (Article 3 of the American Convention), of the human right to consular information and notification (as embodied in Article 8 and 25 of the American Convention) and of the prohibition of collective expulsion (Art. 22.9 of the American Convention). Of course, whether those violations have occurred in the instant case and whether the Dominican Republic should be held responsible, is only for the Court to decide.

141. That being said, amici believe this case is an opportunity for the Court to shed light on the scope of certain key human rights that have hitherto received little attention by international human rights bodies. An authoritative statement from this Court on those rights would go a long way towards strengthening the edifice of human rights by ensuring greater clarity.

142. In particular we urge the Court to declare that:

(он Article 3 - Right to Juridical Personality)

169 Declaration on the Human Rights of Individuals who are not Nationals of the Country in which They Live, supra note 134, at ¶7.
170 African Charter, supra note 20, Art. 12.5.
171 ILC, Expulsion of Aliens, supra note 115, at ¶986.
a) the right to juridical personality is a fundamental human right, universally recognized;

b) the right to juridical personality can never be derogated or suspended, even if the American convention on Human Rights is silent on the issue;

c) the right to juridical personality is a *jus cogens* norm;

d) the right to juridical personality is also inherent in all other rights recognized in the American Convention;

e) everyone, from the moment of birth to the moment of death has the right to juridical personality;

f) although States might recognize everyone the right to juridical personality de jure, respect for the right de facto is mandatory and imperative;

g) that denial of juridical personality, de jure or de facto, no matter how briefly, constitutes a violation of international law;

h) the State must not only give everyone juridical recognition but also guarantee that conditions are such that thus recognition extends to all persons, within or outside its jurisdiction;

(On Article 36 of the Vienna Convention on Consular Relations)

i) the alien’s right to be notified about the right to get in touch with consular authorities and the right to have consular authorities notified whenever aliens are arrested is an individual human right;

j) consular information and notification must be done promptly, as soon as the State has reason to suspect that an alien has been arrested;

k) the State has the burden to prove that consular authorities have been notified and the detainee has been informed of her/his rights;

l) the right is implicit in and inseparable from Article 8 and 25 of the American Convention;

m) the right is explicitly recognized in the Vienna Convention on Consular Relations;

n) in the light of the fact it has been widely ratified worldwide and has been ratified by all states members of the Organization of American States, the right has acquired customary international law status, or, in the alternative, it has acquired customary international law status in the Americas;

o) in the light of Article 31.3.c of the Vienna Convention on the Law of Treaties, the Vienna Convention on Consular relations is a treaty that should be considered by the Court when interpreting the American Convention;

(On Article 22.9 - Collective Expulsions)

p) every State can, at any moment, if it deems it necessary in the interest of its tranquility or domestic or international security, or of the health of its inhabitants, admit or not admit, and to expel or not expel, aliens who wish to enter or who reside in its territory, as well as to impose conditions on their entry or residence. However, this right is not absolute but can only be exercised in conformity with generally accepted principles
of international law, especially international human rights law, both substantive and procedural, and the applicable international agreements, global, regional and bilateral.

q) the right of a State to expel aliens is limited by general standards, such as the prohibition of abuse of rights; the principle of good faith; the prohibition of arbitrariness; and the minimum treatment of aliens. It is also limited by both procedural and substantive requirements such as duty to: provide grounds for an expulsion; not to discriminate; give notice of expulsion proceedings; give a hearing where the person to be expelled is present; provide consular information and notification; provide access to counsel or legal aid; provide translation and interpretation; provide a reasoned decision duly notified; and provide a right to a review of the decision; expel according to humane procedures, that protect the physical integrity as well as the dignity of the person and that are respectful of property rights;

r) collective expulsion is absolutely prohibited under international law (customary international law as well as and under the treaties applicable to the Dominican Republic);

s) the expulsion, without proper individualized review and due process guarantees, of two or more individuals, constitutes a collective expulsion;

t) the grounds on the basis of which the State has decided to expel are immaterial in the determination of whether a “collective expulsion” took place;

u) the State bears the burden to prove beyond reasonable doubts that the collective expulsion did not occur;

v) that existence of discrimination is not a ground to determine whether a collective expulsion took place but it is an aggravating circumstance.

Finally, we also urge the Court to

w) reaffirm its iura novit curia powers;

x) declare aliens –regardless of their legal status - an especially vulnerable group requiring enhanced guarantees.
ANNEX I: List of co-signers of this Amicus Curiae brief and signatures

1) Dr. Juan Pablo Albán
Professor of International Law and International Human Rights Law
Director of the Legal Aid Clinic
Colegio de Jurisprudencia de la Universidad San Francisco de Quito

2) Dr. Juan M. Amaya-Castro
Senior Research Fellow
Faculty of Law
Migration & Diversity Centre
Vrije Universiteit, Amsterdam

3) Prof. Donald K. Anton
Associate Professor of Law
Co-Director, International Programs and Exchanges
Chair, Australian National University E-Press
The Australian National University College of Law, Canberra

4) Prof. Freya Baetens
Assistant Professor of Public International Law
Grotius Centre for International Legal Studies
Faculty of Law
University of Leiden

5) Prof. Caroline Bettinger-López
Associate Professor of Clinical Legal Education
Director, Human Rights Clinic
University of Miami School of Law

6) Prof. Nerina Boschiero
Professor of International Law
Department of Public, Civil Procedure, International and European Law
Faculty of Law
University of Milan

7) Prof. Matthew E. B. Brotmann
Director of International Programs
Adjunct Professor of Law
Pace University School of Law, White Plains, New York

8) Prof. Bartram S. Brown
Professor of Law
Co-Director, Program in International and Comparative Law
Chicago-Kent College of Law

9) Dr. David James Cantor
Director of the Refugee Law Initiative
Lecturer in International Human Rights Law
Co-Convenor of MA in Understanding and Securing Human Rights
Institute of Commonwealth Studies, School of Advanced Study, University of London

10) Prof. Gabriella Citroni
Professor of International Human Rights Law
University of Milano-Bicocca, Milan

11) Dr. Niccolò A. Figà-Talamanca
Secretary General
No Peace Without Justice
Brussels, New York, Geneva

12) Mr. Stefan Kirchner
Researcher
Faculty of Law
Georg-August-University, Göttingen.
Attorney
humanrightslawyer.eu, Frankfurt am Main

13) Prof. Konstantinos D. Magliveras
Associate Professor
Department of Mediterranean Studies
University of the Aegean - Rhodes

14) Mr. Nathan Miller
Senior Fellow for Human Rights and Social Justice
University of Iowa College of Law

15) Prof. Jacqueline M. Nolan-Haley
Professor of Law
Fellow, Chartered Institute of Arbitrators
Director, ADR & Conflict Resolution Program
Fordham Law School, New York

16) Prof. Manfred Nowak
Professor of Constitutional Law and Human Rights
Scientific Director of the Ludwig Boltzmann Institut für Menschenrechte
University of Vienna
Former UN Rapporteur on Torture

17) Prof. Belén Olmos Giupponi
Associate Professor of International Law
King Juan Carlos University, Madrid

18) Prof. Jordan J. Paust
Mike & Teresa Baker Law Center Professor
University of Houston
19) Mrs. Cristina Ponce
Coordinator of Strategic Litigation
Asylum Access Ecuador

20) Prof. Miguel Angel Ramiro Avilés
Professor of Philosophy of Law
University Carlos III, Madrid
Director of the LL.M Program in Fundamental Rights, Co-Director of the LL.M Program in Human Rights and Democratization of the Externado University of Colombia

21) Prof. Margherita Salvadori
Associate Professor
Faculty of Law, University of Turin

22) Prof. Jaume Saura
Professor of International Law
University of Barcelona
Presidente del Instituto de los Derechos Humanos de Catalunya

23) Prof. Tullio Scovazzi
Professor of International Law
University of Milano-Bicocca, Milan

24) Prof. Anna Spain
Associate Professor of Law
University of Colorado Law School

25) Dr. Matthew Zagor
Senior Lecturer, ANU College of Law, and Adjunct Fellow, ANU Centre for European Studies,
The Australian National University, Canberra