Written Comments on the Case of Dilcia Yean and Violeta Bosico v. Dominican Republic

A Submission from the Open Society Justice Initiative to the Inter-American Court of Human Rights

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Introduction

The Open Society Justice Initiative (the "Justice Initiative") as *amicus curiae* respectfully submits this brief to the Inter-American Court of Human Rights (the "Court") in accordance with Article 26 of the Court's Rules of Procedure.

This case concerns issues of great significance for the development and application of legal norms concerning racial discrimination[1] in the enjoyment of the right to a nationality.[2] Racial discrimination in access to nationality is widespread in the Dominican Republic, and in other parts of the world, even though it is prohibited by international and regional human rights norms. Nonetheless, so far as we have determined, this is the first case which squarely presents the issue for resolution by an international or regional court. The first section of this submission reviews prevailing standards and jurisprudence on direct and indirect forms of racial discrimination, describes the origins and contours of the right to a nationality as an international human right, and draws upon international and comparative legal authority in explaining how the prohibition against racial discrimination limits states' discretion in the granting or denying of nationality. The second section demonstrates that racial discrimination in access to nationality takes place systematically in the Dominican Republic. The final section analyzes several examples of racial discrimination from different countries to illustrate that this problem is of global scope. Accordingly, the Court's judgment in this case can make a major contribution to the development of international jurisprudence and the amelioration of grave human rights violations, both in the Dominican Republic and more generally.

Statement of Interest

The Justice Initiative pursues law reform activities grounded in the protection of human rights, and contributes to the development of legal capacity for open societies. It has offices in New York (United States), Budapest (Hungary), and Abuja (Nigeria). Among its activities, the Justice Initiative prepares legal submissions for national and international courts and tribunals on questions of law where its expertise may be of assistance.

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[1] The term "racial discrimination" is used herein as defined in Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination (the "Race Convention") to mean "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

[2] In this submission, the term "nationality" follows the definition employed by this Court as "the political and legal bond that links a person to a given state and binds him to it with ties of loyalty and fidelity, entitling him to diplomatic protection from that state." *Castillo-Petruzzi et al. v. Peru, Judgment of May 30, 1999*, Inter-Am. Ct. H.R. (Ser. C) No. 52 (1999), para. 99; *Baruch Ivcher Bronstein v. Peru, Judgment of February 6, 2001*, Inter-Am. Ct. H.R., (Ser. C) No. 74, para. 91; *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, January 19, 1984*, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984), para. 35. See also *European Convention on Nationality*, Article 2 (nationality is "the legal bond between a person and a State").

Racial equality and non-discriminatory access to nationality are among our core thematic concerns. As an organization that promotes equality before the law and nationality policies in accordance with international human rights norms, the Justice Initiative has a particular interest in the questions raised by this matter.

The Justice Initiative has been involved in standard-setting in this field at the international level, including through advocacy and information-dissemination before United Nations bodies. The Justice Initiative prepared a written submission and convened meetings of interested advocates in preparation for the thematic session on discrimination against non-citizens of the United Nations Committee on the Elimination of Racial Discrimination, held in Geneva in March 2004. In October 2004, the Justice Initiative provided expert assistance to the deliberations of the Executive Committee of the United Nations High Commissioner for Refugees on the common intersections between racial discrimination and statelessness. We are currently engaged in work in Africa, Asia and Europe on documentation and litigation aimed at identifying and combating problems facing minorities in accessing, and retaining, nationality.

Drawing on our expertise, the Justice Initiative has prepared this brief to provide the Court with comparative legal standards and practical information from a variety of jurisdictions concerning racial discrimination and access to nationality.

Statement of Facts

In light of other submissions in this case, this brief will not repeat the facts in detail but provides the following summary of pertinent facts.[3] Dilcia Yean and Violeta Bosico, two girls, both minors, born in the Dominican Republic to Dominican women of Haitian descent, were denied Dominican nationality in spite of the fact that both were born within the territory of the Dominican Republic and that the Constitution establishes the principle of *jus solis*. Refused permission to register their births, the girls were unable to obtain recognition of their legal personality, could not enroll in school because they had no identity documents, and, as undocumented persons, remained vulnerable to expulsion from the country. The petition in this case—filed October 28, 1998 before the Inter-American Commission of Human Rights (the "Inter-American Commission")—argued, *inter alia*, that the girls were deprived of access to nationality because of their race and their Haitian descent. Specifically, petitioners claimed that the offices in charge of processing birth registrations refused to register the girls, saying they had orders not to register or issue birth certificates to children of Haitian descent. The official in charge of the Civil Registry explained that the girls had been born to Haitian parents who were in

[3] This summary is based upon *Report of Admissibility No. 28/01 Case No. 12.189*, Inter-Am. C.H.R. (22 February 2001).

the country illegally. The girls thus had no right to Dominican citizenship. According to petitioners, the statutory requirements for belated declarations of birth indirectly discriminate against ethnic Haitians. The government denied these allegations. On November 22, 1999, the government accepted the Inter-American Commission's offer to help the parties reach a friendly solution. These efforts were ultimately unsuccessful. On February 22, 2001, the Inter-American Commission declared the case admissible with regard to the alleged violation of the right to nationality set forth in Article 20 of the American Convention on Human Rights.

Discussion

I. Racial Discrimination in Access to Nationality Violates Articles 1(1) and 24, Taken Together with Article 20(1) of the American Convention of Human Rights, and Other Provisions of International Law

A. Racial Discrimination in International Law

1. *The Prohibition against Racial Discrimination is a* Jus Cogens *Norm*

As numerous courts have explained, racial discrimination is a particular evil which international and comparative law accords high priority to combating and redressing.[4] Recognized in all major international and regional human rights instruments,[5] the prohibition of

[4] See, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954) (finding that racial segregation in public education violated equal protection clause of Article 14 of U.S. Constitution and noting the particularly "detrimental effect" on minority children); *East African Asians v. United Kingdom*, 3 EHRR 76 (1973), para. 207 (holding that immigration legislation which singled out for exclusion a particular racial group constituted "degrading treatment" under the European Convention of Human Rights and noting that "a special importance should be attached to discrimination based on race").

[5] Article 1(3) of the *United Nations Charter* includes among the purposes of the United Nations "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction to race, sex, language or religion…" Article 55(c) of the Charter commits the United Nations to promote non-discrimination. Article 2 of the *Universal Declaration of Human Rights* states, "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty"; Article 7 holds, "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." See also the *International Covenant on Civil and Political Rights* (ICCPR), Articles 2 ("Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status") and 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status"); the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), Article 2(2) ("The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion,

racial discrimination is a rule of customary international law[6] and has become a *jus cogens*, or peremptory, norm.[7] This Court has so affirmed:

> [T]he principle of equality before the law, equal protection before the law and non-discrimination belongs to *jus cogens*, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable. This principle (equality and non-discrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*.[8]

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political or other opinion, national or social origin, property, birth or other status*"*); the *European Convention of Human Rights* (ECHR), Article 14 ("The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"). Article 1 of Protocol No. 12 to the ECHR, entered into force on April 1, 2005, holds that "[t]he enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status"; Article 2 holds that "No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1." Article 21 of the *European Charter of Fundamental Rights* holds that "Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited". See also the A*frican Charter on Human and Peoples' Rights* (ACHPR), Chapter 1, Article 2 ("Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status"); the *American Convention on Human Rights* (ACHR), Articles 1(1) ("The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition") and 24 ("All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law").

[6] See, e.g., *Restatement (Third) The Foreign Relations Law of the United States* (1987), Sec. 702 ("Customary International Law of Human Rights: A state violates international law if, as a matter of state policy, it practices, encourages, or condones … systematic racial discrimination"). In a recent decision, *R v. Immigration Officer at Prague Airport*, UKHL 55 (2004), the House of Lords, the supreme judicial body in the United Kingdom, detailed the evolution of the prohibition of racial and ethnic discrimination into a rule of international customary law: "The great theme which runs through subsequent human rights instruments, national, regional and international, is the legal right of equality with the correlative right of non-discrimination on the grounds of race…State practice virtually universally condemns discrimination on grounds of race. It does so in recognition of the fact that it has become unlawful in international law to discriminate on the grounds of race. It is true that in the world, as we know it, departures from this norm are only too many. But the international community has signed up to it. The moral norm has ripened into a rule of customary international law. It is binding on all states" (para. 46).

[7] See, e.g., *Legal Consequences for States at the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution* 276 (1970), 1971 ICJ Rep. 3, at 57, para. 131 (advisory opinion); *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa)* 1966 ICJ Rep. 4, at 290, 293 (Tanaka, J., dissenting); *Restatement (Third) The Foreign Relations Law of the United States* (1987), Sec. 702, comment (n). According to Article 53 of the *1969 Vienna Convention on the Law of Treaties*, a peremptory norm of general international law is "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." In addition to the prohibition of racial discrimination, the other peremptory norms of international law include the prohibitions against slavery, murder and disappearance, torture and prolonged arbitrary detention, and genocide.

[8] *Juridical Conditions and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03* o*f September 17, 2003*, Inter-Am. Ct. H.R. (Ser. A) No. 18 (2003), para. 101.

This Court has made clear that both Articles 1(1) and 24 of the American Convention are relevant to a claim of discrimination.[9]

Discrimination on the grounds of national origin is a form of racial discrimination which is equally impermissible under international and comparative law. The CERD has made this clear in its concluding observations with respect to the Dominican Republic[10] and more

[9] *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84, January 19, 1984*, *supra* note 2, para. 54.

[10] UN CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Dominican Republic 26/08/99,* UN Doc. CERD/304/Add.74, para. 11 (recommending that government adopt urgent measures to ensure the enjoyment by "persons of Haitian origin" of their economic, social and cultural rights without discrimination).

generally.[11] Other UN treaty bodies are in accord,[12] as are national legislation and jurisprudence.[13]

[11] The CERD has repeatedly reaffirmed that discrimination on the basis of national origin constitutes one form of prohibited racial discrimination under Article 1 of the Convention. See, e.g., *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Uganda 02/06/2003,* UN Doc. CERD/C/62/CO/11, para. 10 (regretting that legislative measures and judicial mechanisms in place to ensure the return of the property to "persons of Asian origin" had not been fully implemented); *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Croatia 21/05/2002,* UN Doc. CERD/C/60/CO/4, para. 14 ("[c]oncern is expressed that many former long term residents of Croatia, particularly persons of Serb origin and other minorities, have been unable to regain residency status despite their pre-conflict attachment to Croatia"); *ibid*., para. 15 (expressing concern that, in the area of property claims, the courts reportedly continue to favor "persons of Croat origin"); *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Costa Rica 20/03/2002*, UN Doc. CERD/C/60/CO/3, para. 15 (recommending that the State party continue its efforts to ensure the rights of the immigrant population as regards "discrimination on the grounds of race or ethnic or national origin); *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Republic of Moldova 21/05/2002,* UN Doc. CERD/C/60/CO/9, para. 15 (recommending that a parliamentary inquiry into the alleged existence of terrorists among "students of Arabic origin" should avoid "any suspicion of racial profiling"); *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Poland 21/03/2003*, UN Doc. CERD/C/62/CO/6, para. 10 (expressing concern about reports of racially motivated harassment and discrimination against, *inter alia*, "persons of African and Asian origin"); *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Malawi 10/12/2003,* UN Doc. CERD/C/63/CO/12, para. 8 (expressing concern that the registration of birth is not compulsory, except for "children of non-African origin"); *Concluding Observations of the Committee on the Elimination of Racial Discrimination*: *Finland. 28/03/96*, UN Doc. CERD/C/304/Add.7, para. 28 (urging the State party that "[a]ppropriate action should be taken to ensure that access to places or services intended for use by the general public is not denied on grounds of national or ethnic origin, contrary to Article 5(f) of the Convention"); and *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United Kingdom of Great Britain and Northern Ireland 28/03/96*, UN Doc. CERD/C/304/Add.9, para. 238 (expressing concern that the British citizenship granted to South Asian residents of Hong Kong "does not grant the bearer the right of abode in the United Kingdom and contrasts with the full citizenship status conferred upon a predominantly white population living in another dependent territory. It is noted that most of the persons holding BNO or BOC status are Asians and that judgments on applications for citizenship appear to vary according to the country of origin, which leads to the assumption that this practice reveals elements of racial discrimination").

[12] See, e.g., UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Sweden 24/04/2002*, UN Doc. CCPR/CO/74/SWE, para.12 (expressing concern regarding the effect of anti-terrorism campaign on the situation of human rights in Sweden, in particular for "persons of foreign extraction"); *Concluding Observations of the Human Rights Committee: Ireland 03/08/93,* UN Doc. CCPR/C/79/Add.21, para. 17 (expressing concern about discriminatory distinctions between citizens by birth and those who are naturalized and the discriminatory treatment in some respects of non-nationals, including refugees and asylum-seekers). See also Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Iceland 31/01/2003*, UN Doc. CRC/C/15/Add.203, para.22 (welcoming government efforts to address the needs of "people of foreign origin"). See also UN Human Rights Committee, *Gueye et. al. v. France, Communication No. 196/1983*, UN Doc. A/44/40 at 189 ("[u]nder Article 26, discrimination in the equal protection of the law is prohibited on any grounds such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status").

[13] In the United States, for example, the *Civil Rights Act of 1964* (as amended), 42 U.S.C. Section 2000a, prohibits discrimination based on "race, color, religion or national origin" in public establishments that have a connection to interstate commerce or are supported by the state. The US Department of Justice has issued a widely-distributed brochure titled *Federal Protections against National Origin Discrimination* (October 2000), which provides: "Federal laws prohibit discrimination based on a person's national origin, race, color, religion, disability, sex, and familial status. Laws prohibiting national origin discrimination make it illegal to discriminate because of a person's birthplace, ancestry, culture or language...." See also *Korematsu v. United States,* 323 U.S. 214, 216 (1944) (classifications based on national origin, like those based on race, are suspect and subject to strict judicial scrutiny). In the United Kingdom, Section 1 of the *Race Relations Act of 1976* provides that a person discriminates against another in any circumstances relevant for the purposes of any provision of the Act if "... (a) on racial grounds he treats that other less favourably than he treats or would treat other persons…." Section 3(1) of the Act defines "racial grounds" as "any of the following grounds, namely colour, race, nationality or ethnic or national origins…." The Australian *Racial Discrimination Act of 1975* makes it unlawful "for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life" (Section II, Part 9). Canada's *Human Rights Act 1985* lists the prohibited grounds of discrimination as "race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted" (Part I, 3[a]). In Spain, Article 510.1 of the Penal Code penalizes "those who provoke discrimination, hatred, or violence against

2. ***Both Direct Discrimination and Indirect Discrimination are Unlawful***

Direct discrimination is less favorable treatment on the basis of prohibited grounds such as race. Indirect discrimination—also known as "de facto discrimination" or "disparate/adverse impact or effect"—occurs when a practice, rule, requirement or condition is neutral on its face but impacts particular groups disproportionately, absent objective and reasonable justification.

International law prohibits both direct and indirect discrimination. The Race Convention terms as "racial discrimination" all specified actions which have "*the purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms."[14] A similar approach has been adopted by Europe's regional organs.[15]

Articles 1(1) and 24 of the American Convention explicitly prohibit direct discrimination.[16] This Court has held that they also bar indirect discrimination. Thus, "States must abstain from carrying out any action that, in any way, directly or indirectly, is aimed at creating situations of *de jure* or *de facto* discrimination."[17]

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groups of associations for racist, anti-Semitic or other reasons relating to their religion or beliefs, family situation, membership of an ethnic group or race, national origin, sexual orientation or illness or disability. In Belgium, the *Law of 30 July 1981* against racism punishes discrimination inspired by specific motives, among them "race, color, descent, origin, or nationality. In Portugal, Article 13 of the Constitution guarantees protection against discrimination "by reason of [the victim's] ancestry, sex, race, language, territory of origin, religion or ideological convictions, education, economic situation or social circumstances." In the Netherlands, the Criminal Code's prohibition of racial discrimination interprets the term "race" to include ethnic and national origin, descent, and colour. See Marcel Zwamborn, *Executive Summary, Discrimination Based on Racial or Ethnic Origin: The Netherlands* [prepared for the European Union/European Commission on 10 June 2004], at 2).

[14] Race Convention, Article 1(1) (emphasis added). See CERD, *General Recommendation 14: Definition of Discrimination (Art. 1, par.1) 22/03/93* (1993), para. 1 ("A distinction is contrary to the Convention if it has either the purpose or effect of impairing particular rights and freedoms"); *L.R. v. Slovak Republic, Communication No. 31/2003, (CERD Views of 10 March 200*5), UN Doc. CERD/C/66/D/31/2003 para. 10.4 ("the definition of racial discrimination in article 1 [of the Race Convention] expressly extends beyond measures which are explicitly discriminatory, to encompass measures which are not discriminatory at face value but are discriminatory in fact and effect, that is, if they amount to indirect discrimination"). See also UN Human Rights Committee, *General Comment 18: Non-Discrimination 10/11/89* (1989) (using similar language to interpret "discrimination" under Articles 2 and 26 of the ICCPR). This test has been applied in decisions of the UN Human Rights Committee in respect of individual complaints. See, e.g., *Althammer v. Austria*, *Communication No. 998/2001*, UN Doc. CCPR/C/78/D/998/2001, para. 10.2; and *Simunek et al v. Czech Republic*, *Communication No. 516/1992*, UN Doc. CCPR/C/54/D/516/1992, para. 11.7.

[15] European Union*, Council Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin 2000/43* ("EU Race Directive"), Article 2(2). See also the *Belgian Linguistics Case*, 1 EHRR 252 (1968), para. 10 (the existence of an objective and reasonable justification for distinction at issue "must be assessed in relation to the aim and effects of the measure under consideration").

[16] The Inter-American Commission has expressly held that "[s]tatutory distinctions based on such criteria, such as, for example, race or sex…necessarily give rise to heightened scrutiny" in *Maria Eugenia Morales de Sierra v. Guatemala, Report N° 4/00 Case 11.625*, Inter. Am. C.H.R. OEA/Ser. L/V/II.111 Doc. 20 rev. at 929 (2000), para. 36.

[17] *Juridical Conditions and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03* o*f September 17, 2003, supra* note 8*,* para. 103.

3. ***Proving Indirect Discrimination***[18]

The concept of indirect discrimination has been elaborated in other jurisdictions. In the case of *Hugh Jordan v. United Kingdom*, the European Court of Human Rights held, "Where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at the group."[19] Similarly, Article 2(b) of the European Union's *Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin* ("EU Race Directive"), provides that "[i]ndirect discrimination shall be taken to occur when an apparently neutral provision, criterion or practice would put persons or a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary."

In general, indirect discrimination claims have two principal components. First, the complainant must establish a *prima facie* case of indirect discrimination—a showing that application of the rule at issue has produced disproportionately negative effects for members of a particular group. Second, in many jurisdictions,[20] once a *prima facie* case is made out, the burden of proof shifts to the defendant to show either (a) that there is in fact no discriminatory impact, or (b) that the discriminatory impact is objectively and reasonably justified. Once the burden of proof shifts, the court must ascertain whether the evidence adduced by the defendant is adequate to rebut the factual presumption of discrimination drawn from the *prima facie* case of the complainant. If it does not, the court is to consider discrimination as having been proven.

As numerous courts have noted, discrimination is often difficult to prove. In cases of indirect discrimination, the evidence necessary to demonstrate disparate impact is often not in the

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[18] The discussion on indirect discrimination draws, among other sources, upon Interights, *Non-Discrimination in International Law: A Handbook for Practitioners* (2005) (available at www.interights.org); and Interights, *Written Comments of INTERIGHTS in the case of Nachova v. Bulgaria* (*43577/98) (European Court of Human Rights* (2004).

[19] *Hugh Jordan v. United Kingdom (24746/94),* [2001] ECHR 323 (4 May 2001), para. 154. See also *Thlimmenos v. Greece (34369/97)*, [2000] ECHR 161 (6 April 2000), para. 44 ("The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different").

[20] For the United Nations organs, see: UN Human Rights Committee, *Chedi Ben Ahmed Karoui v. Sweden, Communication No. 185/2001*, U.N. Doc. A/57/44 at 198 (2002), para. 10 ("substantive reliable documentation" will shift the burden of proof to the Respondent State); UN CERD, *Conclusions and Recommendations of the Committee on the Elimination of Racial Discrimination: United Kingdom of Great Britain and Northern Ireland 10/12/2003*, U.N. Doc. CERD/C/63/CO/11 (2003), para. 4. For the European Court of Justice, see *Case 170/84 Bilka-Kaufhaus GmbH v. Weber Von Hartz,* 1986 E.C.R. 1607, [1986] 2 C.M.L.R. 701 (1986), para. 31; *Case C-33/89 Maria Kowalska v. Freie und Hansestadt Hamburg*, [1990] ECR I-2591, para. 16; and *C-184/89 Nimz v. Freie und Hansestadt Hamburg* [1991] ECR I297, para. 15; *Case C-109/88 Handels-og Kontorfunktionærernes Forbund i Danmark v. Dansk Arbejdsgiverforening, acting on behalf of Danfoss,* [1989] *ECR 3199* [1989], para. 16. For the European Court of Human Rights, see *Nachova v. Bulgaria (43577/98)* ECHR 89 (26 February 2004) (pending decision of the Grand Chamber). For a number of national jurisdictions, see, for example, the Netherlands (*RK Woningbouwvereniging Binderen v. S. Kaya, 10 December 1982, NJ 1983/687*); Canadian Human Rights Act, section 15; *Canada (British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868 [Grismer], at para. 20; *McDonnell Douglas Corp. v. Green*, 411 U.S. 492 (1973). See also *South African Promotion of Equality and Prevention of Unfair Discrimination Act of 2000*, section 13 and section 54A; *New Zealand Human Rights Act 1993*, section 92F; *United States Civil Rights Act 1991*, section 105(a).

control of the complainant(s). Accordingly, several jurisdictions have devised methods to compensate for the particular complexities of proof in cases of indirect discrimination.[21]

A number of courts have held that evidence of "a general picture" of disadvantage or "common knowledge" of discrimination might be sufficient to constitute a *prima facie* case.[22] In reviewing individual communications, the UN CERD has noted that, "[i]n assessing … indirect discrimination, the Committee must take full account of the particular context and circumstances of the petition, as by definition indirect discrimination can only be demonstrated circumstantially."[23] In New Zealand, courts have found discrimination on the basis of "judicial notice," where, it is reasoned, a fact "is so generally known that every ordinary person may be reasonably presumed to be aware of it."[24] The U.S. Supreme Court has noted that "[t]he burden of establishing a prima facie case of disparate treatment is not onerous."[25] In the United Kingdom, courts have held that the unavailability of direct evidence of discrimination in most cases warrants the drawing of reasonable inferences from facts.[26] Inferences are particularly important in the context of combating "institutional" or "systemic" discrimination,[27] where a discriminator may be unaware of his or her own prejudices, and is merely acting in accordance with a framework of entrenched societal bias. It is well established that a victim's race need not be shown to be the only or even the main reason for the less favorable treatment; it is sufficient if it had a "significant influence on the outcome."[28]

Intent to discriminate is irrelevant to a finding of discrimination.[29] In *Griggs v. Duke Power Company*,[30] the first case to set forth the concept of indirect discrimination, the U.S. Supreme Court reasoned: "[G]ood intent or absence of discriminatory intent does not redeem … procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring … capability."[31] Although discriminatory intent is a requirement of

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[21] This tendency is in accord with this Court's observations that international human rights courts particularly should "enjoy substantial flexibility in the assessment of evidence submitted to them regarding the respective facts, to establish the international responsibility of a State, in accordance with the rules and logic and based on experience." *Bulacio v. Argentina, Judgment of September 18, 2003*, Inter-Am. Ct. H.R., (Ser. C) No. 100 (2003), para. 4. See also *Nachova v. Bulgaria, supra* note 20, para. 168 ("it has become an established view in Europe that effective implementation of the prohibition of discrimination requires the use of specific measures that take into account the difficulties involved in proving discrimination").

[22] See, from the United Kingdom, *London Underground v. Edwards (No. 2)* 1999 ICR 494 CA (1999); and from Australia, *Mayer v. Australian Nuclear Science and Technology Organisation* EOC 93-285 (2003).

[23] *L.R. v. Slovak Republic, Communication No. 31/2003, (CERD Views of 10 March 2005)*, *supra* note 14, para. 10.4.

[24] *Auckland City Council v. Hapimana* [1976] 1 NZLR 731, at 733; *Northern Regional Health Authority v. Human Rights Commission* [1998] 2 NZLR 218, at 242.

[25] *Texas Dept. of Community. Affairs v. Burdine* 450 U.S. 248, 253 (1981). See also *Canada (Human Rights Commission) v. Canada (Department of National Health and Welfare)* 4 F.C. D 7 (1998).

[26] See *Anya v. Oxford University* EWCA Civ 405 (2001), para. 9.

[27] The Canadian Supreme Court discussed this phenomenon at length in *British Columbia (Public Service Employee Relations Commission) v. British Columbia (Government and Service Employees' Union)*, 3 S.C.R. 3] (1999), para. 41.

[28] *Nagarajan v London Regional Transport* [1998] IRLR 73 [House of Lords], 76, para 13, n. 8, per Lord Nicholls of Birkenhead at 513B.

[29] *Hugh Jordan v. United Kingdom*, *supra* note 19, para. 154; *Nachova v. Bulgaria*, *supra* note 20, para. 167.

[30] *Griggs v. Duke Power Co.,* 401 U.S. 401 U.S. 424 (1971).

[31] *Ibid* at 432.

constitutional equal protection claims in the United States,[32] most other jurisdictions continue to follow the *Griggs* approach.[33]

With respect to the notion of justification, this Court has held that "there would be no discrimination in differences of treatment of individuals by a state when the classifications selected are based on substantial factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review."[34] Other jurisdictions, including United Nations treaty bodies,[35] the European Court of Justice[36] and the European Court of Human Rights,[37] use similar tests. The EU Race Directive provides that prima facie discriminatory measures can be justified by a pursuit of a "legitimate aim" where the means of achieving this aim are "appropriate and necessary."[38]

B. **The Right to Nationality as an International Human Right**

Since the rise of the nation-state in the 18th and 19th centuries, the right to a nationality has, in practice, become integral to the enjoyment of almost all other rights. As the Inter-American Commission itself has explained:

> [Nationality] is one of the most important rights of man, after the right to life itself, because all other prerogative guarantees and benefits man derives from his membership in a political and social community – the States – stem from or are supported by this right.[39]

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[32] See *Washington v. Davis*, 426 U.S. 229 (1976).

[33] Among United Nations organs, see, e.g., the UN Human Rights Committee, *Brooks v. The Netherlands Communication No. 172/1984*, UN Doc. CCPR/C/29/D/172/1984, paras. 12.3 - 16 (finding violation of ICCPR Article 26 on grounds of sex discrimination, even though State party had not intended to discriminate against women); *Simunek et al. v. Czech Republic*, *supra* note 14, para. 11.7 ("the intent of the legislature is not alone dispositive in determining a breach of article 26 of the Covenant. A politically motivated differentiation is unlikely to be compatible with article 26. But an act which is not politically motivated may still contravene article 26 if its effects are discriminatory"); *Althammer v. Austria*, *supra* note 14, para. 10.2 (employing similar reasoning); UN CERD, *General Recommendation No. 19*: *Racial segregation and apartheid (Art. 3*) *18/08/95*, para. 3 ("condition of [unlawful] partial segregation may also arise as an unintended by-product of the actions of private persons"). The principle is well-established in Europe as well. See *Hugh Jordan v. United Kingdom*, *supra* note 19, para. 154.

[34] *Proposed Amendments to the Naturalization Provision of the Constitution of Costa Rica, Advisory Opinion OC-4/94, supra* note 2, para. 57.

[35] See UN Human Rights Committee, *General Comment 18: Non-Discrimination 10/11/89*, *supra* note 14, para. 13 ("not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant"); UN CERD, *General Recommendation 14: Definition of Discrimination (Art. 1, par. 1)*, *supra* note 14, para. 2 ("A differentiation of treatment will not constitute discrimination if the criteria for such differentiation, judged against the objectives and purposes of the Convention, are legitimate or fall within the scope of article 1, paragraph 4, of the Convention").

[36] *Bilka-Kaufhaus GmbH v. Weber Von Hartz,* , *supra* note 20, para. 36 (measures at issue must "correspond to a real need on the part of the undertaking, [and] are appropriate with a view to achieving the objectives pursued and are necessary to that end").

[37] Numerous European Court judgments have reaffirmed the standard originally elaborated in the *Belgian Linguistics Case*, *supra* note 15, para. 10: "A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 … is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized."

[38] Article 2(2)(b).

[39] Inter-American Commission for Human Rights, *Third Report on the Situation of Human Rights in Chile*, "Chapter IX: 'Right to Nationality,'" Inter-Am. C.H.R. OEA/Ser.L/V/II/40 Doc 10, February 1977, para. 10.

International law has traditionally afforded states broad discretion to define the contours of and delimit access to nationality. Nonetheless, due in large part to the visceral link between the right to a nationality and the enjoyment of other fundamental human rights, emerging international and comparative legal norms and jurisprudence make clear that nationality laws and practices must be consistent with the principles of international law. In 1923, the Permanent Court of International Justice ruled that in the context of state allocation of nationality, "[t]he question of whether a certain matter is or is not solely within the domestic jurisdiction of a States is an essentially relevant question; it depends on the development of international relations."[40] Along similar lines, Article 1 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws decreed that

> It is for each State to determine under its own laws who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.[41]

In the decades after World War II, the right to nationality gained wider recognition in regional and international instruments. Thus, the Universal Declaration of Human Rights makes clear that "[e]very one has a right to a nationality" and that "[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."[42] The European Convention on Nationality is in accord.[43] The American Convention on Human Rights affirms the general right to nationality and the prohibition against arbitrary deprivation, and adds that "[e]very person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality."[44]

International law places particular emphasis on the right to a nationality enjoyed by children. The International Covenant on Civil and Political Rights affirms the right of every child to acquire a nationality.[45] The Convention on the Rights of the Child imposes quite specific obligations on States in this field: "The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality, and, as far as possible, the right to know and be cared for by his or her parents."[46] Furthermore, "States Parties shall undertake to respect the right of the child to preserve his or her identity, including nationality,

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[40] *Nationality decrees issued in Tunis and Morocco-Advisory opinion* [1922] PCIJ 3 (4 October 1922), para. 24.
[41] *1930 Hague Convention on Conflict of Nationality Laws* 179 LNTS 80; 1930 Can. T.S. No. 7.
[42] *Universal Declaration of Human Rights*, Article 15.
[43] Article 4 provides, "(a) Everyone has a right to a nationality; (b) statelessness should be avoided; (c) no one shall be arbitrarily deprived of his or her nationality."
[44] Article 20.
[45] *ICCPR,* Article 24(3).
[46] *Convention on the Rights of the Child,* Article 7(1).

name and family relations as recognized by law without unlawful interference."[47] The Committee on the Rights of the Child has noted that the failure to register children's birth "implies the non-recognition of these children as persons before the law, which will affect the level of enjoyment of their fundamental rights and freedoms."[48] These requirements reflect the well-settled principle that nationality must not only be accessible as a matter of law; it must be capable of being readily established as a matter of practice. Multiple international human rights organs have recognized that prompt registration of birth is essential to enable data and place of birth to be conclusively established, thereby activating certain rights, including those which are dependent on nationality and personality status.[49]

In its commentary to the Preamble to the 1997 Draft Articles on the Nationality of Natural Persons in Relation to the Succession of State*s* adopted at its 51st Session in 1999, the International Law Commission characterized the change in the international legal status of nationality as follows: "[A]lthough nationality is essentially governed by national legislation, the

47 *Ibid.,* Article 8(1).

48 Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Madagascar 24/10/94,* UN Doc. CRC/C/15/Add.26, para.10.

49 United Nations High Commissioner for Refugees, *Refugee Children: Guidelines on Protection and Care* (1994)*,* at 103-104. See also UNICEF, *Birth Registration Right From the Start*, Innocenti Digest No. 9 (March 2002), at 4 ("Birth registration establishes the child's identity and is generally a prerequisite for issuing a birth certificate. A fully registered birth and the accompanying birth certificate help a child secure the right to his or her origins, to a nationality, and also help to safeguard other human rights); UNICEF, *Implementation Handbook for the Convention on the Rights of the Child* (2002), at 108 ("The child's right to be 'registered immediately after birth': The importance of universal registration: … [R]egistration is the State's first official acknowledgement of the child's existence; it represents a recognition of each child's individual importance to the State and of the child's status under the law. Where children are not registered, they are less likely to be visible, and sometimes less valued citizens"); *ibid.,* at 111 ("According to the Convention, the child should be registered 'immediately after birth' which implies a defined period of days rather than months"). See also Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Senegal 27/11/95,* UN Doc. CRC/C/15/Add.44, para. 22 ("The Committee suggests that special efforts be developed to ensure an effective system of birth registration, in the light of Article 7, to ensure the enjoyment of the fundamental rights of the Convention by all children without discrimination and as a meaningful tool to assess prevailing difficulties and to promote progress"); and *Concluding Observations of the Committee on the Rights of the Child: Ethiopia. 24/01/97*, UN Doc. CRC/C/15/Add.67, para. 29 ("The Committee recommends that special efforts be developed to guarantee an effective system of birth registration, in the light of article 7 of the Convention, to ensure the full enjoyment of their fundamental rights by all children") UN Human Rights Committee, *General Comment 17: Article 24 (Thirty-fifth session, 1989)*, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc. HRI/GEN/1/Rev.1 at 23, para. 7 (*"*Under article 24, paragraph 2, every child has the right to be registered immediately after birth and to have a name. In the Committee's opinion, this provision should be interpreted as being closely linked to the provision concerning the right to special measures of protection and it is designed to promote recognition of the child's legal personality"); *ibid.*, para. 8 ("[s]tates are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born"). The Committee on the Rights of the Child has repeatedly underscored the key role played by birth registration and issuance of birth certificates in accessing the right to nationality. See, for example, *Concluding Observations of the Committee on the Rights of the Child: Bhutan 09/07/2001*, UN Doc. CRC/C/15/Add.157, para. 34 ("the Committee is concerned that the failure of timely birth registration can have negative consequences on the full enjoyment by children of their fundamental rights and freedoms," including the right to nationality). In its *General Comment No. 3: HIV/AIDS and the Child*, the Committee on the Rights of the Child further emphasized the importance of birth registration and related human rights: "The Committee wishes to emphasize the critical implications of proof of identity for children… as it relates to securing recognition as a person before the law, safeguarding the protection of rights, in particular to inheritance, education, health and other social services, as well as to making children less vulnerable to abuse and exploitation… In this respect, birth registration is critical to ensuring the rights of the child… States parties are, therefore, reminded of their obligation under article 7 of the Convention to ensure that systems are in place for the registration of every child at or immediately after birth" (para. 32).

competence of States in this field may be exercised only within the limits set by international law…. As a result of this evolution in the field of human rights, the traditional approach based on the preponderance of the interests of States over the interests of individuals has subsided."[50] Article 3(1) of the European Convention on Nationality similarly states that "[t]his law shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognized with regard to nationality."

The growing recognition of a right to nationality at international level has been reflected in the jurisprudence of this Court. In 1984, affirming that "[n]ationality is an inherent right of all human beings,"[51] this Court explained the evolution of international law:

> The classical doctrinal position, which viewed nationality as an attribute granted by the State to its subjects, has gradually evolved to the point that nationality today is perceived as involving the jurisdiction of the State as well as human rights issues[52]…. [I]n order to arrive at a satisfactory interpretation of the right to nationality, as embodied in Article 20 of the Convention, it will be necessary to reconcile the principle that the conferral and regulation of nationality fall within the jurisdiction of the state, that is, they are matters to be determined by the domestic law of the state, with the further principle that international law imposes certain limits on the state's power, which limits are linked to the demands imposed by the international system for the protection of human rights[53]….[D]espite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by states in that area, and that the manner in which states regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; those powers of the state are also circumscribed by their obligations to ensure the full protection of human rights.[54]

More recently, the Court again affirmed that "[t]he right to nationality is recognized by international law. This Court considers that it is a right of the individual…. [I]nternational law imposes certain limits on a State's discretionality and … in the regulation of nationality, it is not only the competence of States, but also the requirements of the integral protection of human rights that intervene."[55]

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[50] International Law Commission, *Report of the International Law Commission on the work of its fifty-first session 3 May-23 July 1999 (A/54/10)*, "Chapter IV: Nationality in Relation to the Succession of States," Commentary [3], Commentary [5] on the Preamble.
[51] *Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica*, *Advisory Opinion OC-4/84*, *supra* note 2, para. 32.
[52] *Ibid*.
[53] *Ibid.,* para. 38.
[54] *Ibid.,* para. 37.
[55] *Ivcher Bronstein v. Peru*, *supra* note 2, paras. 86, 88.

C. International and Comparative Law Bars States from Refusing to Grant Nationality on the Basis of Race

One of the principal constraints on state discretion to grant or deny nationality is the proscription against racial discrimination. This principle is reflected in international treaties, the conclusions of international and regional monitoring bodies, and comparative national legislation outlawing discrimination in access to nationality on the grounds of race, ethnicity, and/or national origin.

Reflecting the state of international law more generally, the Race Convention affords States considerable latitude to adopt legislation "concerning nationality, citizenship or naturalization."[56] However, the realm of State discretion in the field of nationality has an outer limit—the prohibition against racial discrimination. Accordingly, the Convention prohibits States from "discriminat[ing] against any particular nationality."[57] More affirmatively, it obliges States to "guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, in the enjoyment of … the right to nationality."[58]

In its General Recommendation No. 30 on Discrimination against Non-Citizens, the UN Committee on the Elimination of Racial Discrimination made clear that the Race Convention is in no way intended to shield from scrutiny racially discriminatory nationality policies. Thus, the General Recommendation affirmed unequivocally that "deprivation of citizenship on the basis of race, colour, descent, or national or ethnic origin is a breach of States parties' obligations to ensure non-discriminatory enjoyment of the right to nationality."[59] States parties should "[e]nsure that particular groups of non-citizens are not discriminated against with regard to access to citizenship or naturalization, and…pay due attention to possible barriers to naturalization that may exist for long-term or permanent residents."[60] Finally, the General Recommendation suggested that States "[t]ake into consideration that in some cases denial of citizenship for long-term or permanent residents could result in creating disadvantage for them in access to employment and social benefits, in violation of the Convention's anti-discrimination principles."[61]

Other international instruments similarly prohibit racial discrimination in respect of nationality. The respective non-discrimination guarantees of the International Covenant on Civil and Political Rights—when read both independently (Article 26),[62] and together with the right to

[56] Race Convention, Article 1(3).
[57] *Ibid*.
[58] *Ibid,* Article 5(d)(iii).
[59] UN CERD, *General Recommendation No. 30: Discrimination against Non-Citizens 01/10/2004*, para. 14.
[60] *Ibid.,* para. 13
[61] *Ibid.,* paras. 13-15.
[62] Article 26 mandates a guarantee to all persons of "equal and effective protection against discrimination on any ground such as race, colour … national or social origin…."

nationality for children (Article 2, taken together with Article 24(2))[63]—prohibit racial discrimination against children in the right to acquire a nationality.

The Convention on the Rights of the Child, which, as noted above, guarantees the right of all children to acquire a nationality, requires that this right be "respect[ed] and ensure[d] … without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour … national, ethnic or social origin."[64]

These guarantees of non-discrimination in access to nationality have been reinforced by the practice of United Nations organs in monitoring state compliance. In 1996, the CERD found that (then-) Zairian legislation restricting access to nationality for the Banyarwanda ethnic group to those who could prove that their ancestors had lived in Zaire since 1885 violated Article 5(d)(iii) on the right to nationality of the Race Convention.[65] In 1999, when examining the Syrian Arab Republic, the CERD underscored the need "to protect the rights of all persons belonging to ethnic and national groups to enjoy, without discrimination, the civil and political rights listed in Article 5 of the Convention, notably the right to nationality…."[66] In 2001, the CERD expressed concern about the difficulties experienced by the Crimean Tartar minority in acquiring Ukrainian citizenship, and noted that the Race Convention might require revision of legislation and practice.[67] More recently, the CERD took note of Russia's discriminatory application of formal citizenship rights to the Meskhetian minority in the Krasnodar Krai region in 2003, and urged the government to "ensure that the Meskhetians … are given residence registration and enjoy the rights and benefits of citizenship."[68]

With respect to children's right to a nationality, the UN Human Rights Committee has clarified that

> States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born. In this connection, no discrimination with regard to the acquisition of nationality should be admissible under internal law as between legitimate children and children born out of wedlock or of stateless parents or based on the nationality status of one or both of the parents.[69]

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[63] Article 2 provides that: "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour … national or social origin…."

[64] *Convention on the Rights of the Child*, Article 2(1).

[65] UN CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Democratic Republic of the Congo 27/09/96.* UN Doc. CERD/C/304/Add.18, paras. 17 and 25.

[66] UN CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Syrian Arab Republic 07/07/99*, UN Doc. CERD/C/304/Add. 70, para. 14; and *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Kuwait. 15/09/93*, UN Doc. A/48/18, paras. 359-381.

[67] UN CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Ukraine 16/08/2001*, UN Doc. A/56/18, para. 374.

[68] UN CERD, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Russian Federation 21/03/2003*, UN Doc. CERD/C/62/CO/7, para. 12.

[69] UN Human Rights Committee, *General Comment 17: Rights of the Child (Article 24) 07/04/89*, para. 8.

The Committee on the Rights of the Child has repeatedly recalled that racial discrimination against children in access to nationality, including the discriminatory application of the right to birth registration, is a violation of the Convention on the Rights of the Child. In 2003, the Committee, in reviewing the Syrian Arab Republic's failure to grant nationality to Kurdish children, emphasized that

> [A]rticles 2 and 7 of the Convention require that all children within the State party's jurisdiction have the right to be registered and acquire a nationality, irrespective of the child's or his or her parents' or legal guardians' sex, race, religion or ethnic origin.[70]

In 2001, the Committee advised the Democratic Republic of the Congo of its concern that the right to nationality of certain ethnic groups was not being respected, and urged the government to "ensure that all children, without discrimination, are accorded a nationality…."[71] The Committee has expressed similar concerns in other cases.[72]

In 1997, a resolution of the United Nations Commission on Human Rights affirmed "the importance of the right to nationality of every human person as an inalienable human right," and recognized "that arbitrary deprivation of nationality on racial, ethnic, or religious grounds is a violation of human rights and fundamental freedoms."[73] The resolution called upon all States "to refrain from taking measures and enacting legislation that discriminates against persons or groups of persons on grounds of race, colour or national or ethnic origin by nullifying or impairing the exercise, on an equal footing, of their right to nationality, and to repeal such legislation if it already exists."[74]

The prohibition against racial discrimination in access to nationality has equally firm roots at the regional level and in national legislation. Articles 1(1) and 24 of the American Convention, together with Article 20, prohibit racial discrimination in the enjoyment of the right to a nationality. Article 5(1) of the European Convention on Nationality expressly mandates that

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[70] Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Syrian Arab Republic 10/07/2003*, UN Doc. CRC/C/15/Add.212, para. 33.

[71] Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Democratic Republic of the Congo 09/07/2001*, UN Doc. CRC/C/15/Add.153, paras. 28-29.

[72] See, for example, *Concluding Observations of the Committee on the Rights of the Child: Bhutan*, *supra* note 49, para. 37 ("The Committee is concerned at violations of the right to a nationality for children whose birth has not been registered or for children born in the State party and whose parents are not nationals of the State party…. The Committee recommends that the State party examine concerns relating to the access of children to a nationality and make every effort to improve respect for this right. The Committee also recommends that the State party give attention to the situation of children whose parents are unable to claim the State party's nationality"); *Concluding Observations of the Committee on the Rights of the Child: Central African Republic 18/10/2000,* UN Doc. CRC/C/15/Add.138, paras. 38-39 (expressing concern that the government was violating the right to nationality for children born in the Central African Republic whose parents were not nationals, and recommending that the State party "examine concerns relating to the access of children to a nationality and make every effort to improve respect for this right. The Committee also recommends that the State party give attention to the situation of children whose parents are unable to claim the State party's nationality").

[73] United Nations Commission on Human Rights, *Human Rights and Arbitrary Deprivation of Nationality*, U.N. Doc. E/CN.4/1997/36[1997], paras. 1 and 2.

[74] *Ibid.,* para. 3.

"[t]he rules of a State party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin." The Council of Europe is in accord:

> It must be recognized that in general there is a consensus in the international community that the sovereignty of states in matters of nationality has some limits, as the rules laid down in internal law must be compatible with international law and take into account the interest of individuals concerned … [The Committee of Ministers] stresses the absolute inadmissibility of any discrimination related to sex, religion, race, colour or national or ethnic origin in the legislation on nationality and its application.[75]

Finally, discrimination on the basis of race and/or ethnicity in the granting or denial of nationality is expressly outlawed by the national legislation of numerous countries, including the following:

- Article 4 of the *Law on Citizenship of the Republic of Moldova* of 2000 mandates that "[i]ssues of citizenship of the Republic of Moldova shall be regulated by the Constitution of the Republic of Moldova, the international treaties to which the Republic of Moldova is part, by the present law, as well as by other normative documents adopted according to these," including the Race Convention, the Convention on the Rights of the Child, the International Convention on Civil and Political Rights, and the European Convention on Nationality.
- According to the *Federal Law on Citizenship of the Russian Federation*, rules governing nationality in Russia "shall not include provisions which restrict citizens' rights on the grounds of social or national origin, race, language or religion."[76]
- In Ukraine, nationality legislation defines citizens as "persons, irrespective of their race, color of their skin … ethnic and social origins … who were residing in Ukraine at the moment of entry into force of the Law of Ukraine On Citizenship of Ukraine (13 November 1991) and who were not citizens of other states."[77]
- The *Law of the Azerbaijan Republic on Citizenship of the Azerbaijan Republic* entitles a foreigner or stateless person who satisfies residency and language requirements to citizenship, "regardless of his/her origin, social and property status, race and nationality,

[75] Council of Europe Committee of Ministers, *Explanatory Memorandum to Recommendation Rec (1999)18 on the avoidance and reduction of statelessness* (Adopted by the Committee of Ministers on 15 September 1999, at the 679th meeting of the Ministers' Deputies).
[76] *Federal Law on Citizenship of the Russian Federation* (2002), Article 4(1).
[77] *The Law of Ukraine on Citizenship of Ukraine,* (1991) Article 3(2).

sex, educational background, language, religious views, political and other convictions."[78]

- Racial discrimination in access to nationality, which has a long history in the United States, was outlawed by the *Immigration and Nationality Act of June 27, 1952*, which made all races and ethnicities eligible for naturalization. Section 1422 of the Act mandates that "[t]he right of a person to become a naturalized citizen of the United States shall not be denied or abridged because of race or sex or because such person is married."[79]

II. The Dominican Republic Systematically Discriminates Against Persons of Haitian Descent in Access to Nationality

A. *The situation in the Dominican Republic*

As numerous international monitoring bodies have repeatedly noted, the Dominican Republic has systematically denied persons of Haitian descent access to nationality because of their race. As recently as 2001, the Committee on the Rights of the Child expressed concern "at the discrimination against children of Haitian origin born in the State party's territory or belonging to Haitian migrant families … whose right to birth registration has been denied in the State party. As a result of this policy, those children have not been able to enjoy fully their rights."[80] Human Rights Watch has similarly concluded: "Dominico-Haitians are systematically refused proof of Dominican citizenship. The denial often begins in the hospital where they are born, when hospital staff refuses to provide their parents with proof of the birth. Later in their lives, the obstacles to obtaining proof of citizenship become even more difficult to surmount. The result is that many Dominicans of Haitian descent live a precarious existence, perpetually at risk of deportation."[81] Ethnic Haitians are thus forced into a cycle of vulnerability, with multiple generations lacking the proper documentation to enable them to claim their lawful nationality and access other fundamental human rights, including education, freedom of movement, and political participation.

The Dominican Republic's widespread prevention of the registration of children of Haitian descent, by blocking the issuance of birth certificates that are the principal form of proof

[78] Article 14.
[79] Sec. 311, 66 Stat. 239 (1952), 8 U.S.C. Sec. 1422.
[80] Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Dominican Republic 21/02/2001*, CRC/C/15/Add.150 (2001), paras. 22 and 26.
[81] Human Rights Watch, '*Illegal People': Haitians and Dominico-Haitians in the Dominican Republic* (Vol. 1, No. 1(B) (April 2002) at 3.
[82] *Ibid* at 24.

of citizenship for both minors and adults,[82] is troublesome. In carrying out a policy of systematic discrimination in access to nationality against Dominicans of Haitian descent, the Dominican Republic has violated international law and its own Constitution. The Dominican Republic's discriminatory policy with respect to nationality has manifested itself in several distinct ways.

B. *Direct Discrimination*

First, some government conduct reflects direct discrimination on the basis of race. Thus, under Dominican legislation, a birth may be registered either at the hospital where it occurs within twelve hours[83] or at a civil registry office within thirty days.[84] As the Inter-American Commission has noted, many hospital officials and/or civil registrars outright refuse to issue birth certificates to children of Haitian descent because they are black, or perceived to be black.[85] Relevant authorities often refuse to enter children of Haitian descent in the civil registry.[86] There have been reports that civil registry officials have received orders from their superiors not to register or expedite birth certificates to children of Haitian descent.[87]

In addition to simply refusing to register births, some civil registry officials have engaged in other kinds of direct discrimination, including demanding that persons perceived to be of Haitian descent produce documents (in order to justify registration of births) that are neither requested of others nor clearly prescribed in Dominican legislation. For example, *Law No. 659 of July 17, 1944 on Acts of Civil Status* does not require that parents present their identity documents in order to register children. All that the law requires are the child's medical records, including finger and foot prints, the mother's name and age, and the time and date of birth.[88] Nevertheless, ethnic Haitian parents have been illegally required to present these identity documents at many Civil Registries.[89] Not coincidentally, most ethnic Haitians lack such documentation. Many ethnic Haitian parents were themselves unable to obtain a birth certificate and therefore lack the valid identity documents extra-legally required by the Civil Registry offices. Others are migrant workers and possess only Haitian government documents or no documents at all. This

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[83] *Ley 136-03 Código para el Sistema de Protección y los Derechos Fundamentales de los Niños, Niñas y Adolescentes* [Law 136-03: Code for the System of Protection and Fundamental Rights of Boys, Girls, and Adolescents], *Title II, Chapter II*, Article 4.

[84] *Ley No. 659 Sobre Actos del Estado Civil of July 17, 1944* [Law No. 659 on Acts of Civil Status], Article 39.

[85] Inter-American Commission on Human Rights, *Dominican Republic 1999*, "Chapter IX: Situation of Migrant Workers and Their Families in the Dominican Republic," Inter-Am. C.H.R. OEA Rev. 1 (7 October 1999) para. 352.

[86] Human Rights Watch, *'Illegal People,' supra* note 81, at 24.

[87] Inter-American Commission "Chapter IX: Situation of Migrant Workers and Their Families in The Dominican Republic," *supra* note 85, para. 356.

[88] *Ley No. 659, supra* note 84, Article 40. See also *Ley 136-03, supra* note 83, para. 4: "The health institutions, centers and services must keep a registry of all births that take place in the same, via individual medical files, where it will be stated, in addition to pertinent medical facts, the identification of the newborn via his or her finger and foot prints, name and age of the mother, and the date and time of birth, without prejudice to other methods of identification that may be used."

[89] Inter-American Commission, *Annual Report of the Inter-American Commission on Human Rights*, "Chapter V(a): Dominican Republic," Inter-Am. C.H.R. OEA/Ser./L/V/II.114 doc. 5 rev. 16 April 2002, para. 77.

discriminatory, extra-legal requirement effectively bars ethnic Haitians from registering their children's births.

The problem of direct discrimination is exacerbated when births are not immediately registered. Under Dominican law, if a birth is not registered either (i) in the hospital at the time of birth or (ii) in the local office of the Civil Registry within 30 days of the date of birth, the Civil Registry reviews the application for the birth certificate and forwards the applicant's file to a civil judge for review.[90] The review process normally takes a few months. The birth certificate is issued only upon a judge's approval. But ethnic Haitians are commonly singled out for discriminatory treatment at this stage of the process as well. Thus, according to Human Rights Watch, "civil registries generally refuse to forward applications filed by undocumented Haitian parents, telling the parents that it is pointless to send the application because the court will reject it."[91]

C. *Indirect Discrimination*

In addition to direct discrimination, children of Haitian descent are commonly subjected to various forms of indirect discrimination in access to nationality. In the Dominican Republic, there exist two different systems and sets of regulations for registering births. Registrations of birth up to the age of sixteen are governed by the *Law on Acts of Civil Status*.[92] Late birth registrations after the age of sixteen are governed by the Junta Central Electoral's *Requirements for Late Birth Declaration*.[93] The procedure for late birth registration for those older than 16 imposes requirements for document production which indirectly discriminate against ethnic Haitians. According to the Junta Central Electoral, the government institution responsible for late registration of births, applicants must fulfill eleven requirements in order for their birth to be registered. These requirements include the following:

- birth certificate containing the child's sex, date of the birth and mother's name;
- name of the mother and identity card numbers of the parents;

[90] See *Ley No. 659*, *supra* note 84, Article 39. See also *Ley 136-03, supra* note 83, para. 3 ("In the case of boys or girls who were not born in a private of public [medical] center, and before the refusal of the authorities charged with registering the births in the Civil Registry, the mother, father or guardian, himself or via special representation, can, through the National Council for Childhood and Adolescence (CONAMI), and having proof of the birth, request the Tribunal for Boys, Girls, and Adolescents to register his or her birth in the Civil Registry."

[91] Human Rights Watch, 'Illegal People,' supra note 81, at 24. See also Inter-American Commission, "Chapter IX: Situation of Haitian Migrant Workers and their Families," supra note 85, paras. 75-77.

[92] *Ley No. 659*, *supra* note 84.

[93] Junta Central Electoral, *Requisitos para la Declaración Tardía de Nacimientos* [Requirements for Late Birth Declaration] (2001).

- certificate of registration in a public or private school, containing the most recent academic level and the status of the person whose birth is registered and indicating that no other birth certificate was previously issued;
- evidence that the person whose birth is being registered has been issued an identity card, as certified by the Junta Central Electoral;
- certification by the Civil Register office in the local judicial district where the child is born stating that the person making a late birth registration has not previously been registered in that office, when the birth is being registered in a different locality if there is more than one Civil Register office in the place of birth, each one is obliged to issue such certification;
- sworn statement by three literate witnesses at least 50 years of age attesting to the birth.[94]

Although neutral on their face, these requirements have a disproportionately discriminatory effect on persons of Haitian descent. First, by virtue of some of the directly discriminatory patterns noted above, ethnic Haitians are disproportionately unable to produce certain documents on the list, such as birth certificates. Many ethnic Haitian parents possess no identity documents. Often they or their parents may not have brought any identity documents from Haiti when they arrived in the Dominican Republic. Even many families who have lived in the Dominican Republic for generations have been unable to obtain the "*cédula*," the principal form of identification in the Dominican Republic, precisely because a birth certificate is a necessary prerequisite to acquiring one.[95] Because public schools require birth certificates for matriculation, ethnic Haitians are often unable to enroll and obtain copies of certified school registrations. As a result, many ethnic Haitians are not literate.

Second, the requirements for both initial birth registration and late registration place a significant financial burden on a population widely regarded as being among the poorest in the country. The Inter-American Commission has repeatedly highlighted the "precarious" and "unhealthy" living conditions of ethnic Haitians.[96] These observations have been echoed by other monitoring bodies, including the UN Human Rights Committee; the UN Committee for Economic, Social and Cultural Rights; and the UN CERD.[97] Many ethnic Haitians work either on

[94] *Ibid*. See also UN Human Rights Committee, *Follow-up State Reporting*, "Chapter VII: Follow-Up to Concluding Observations – Dominican Republic," UN Doc. CCPR/A/58/40 vol. I (2003).
[95] *Ley No. 8-92: Ley de Cedúla* [Law No. 8-92: Law on the Cédula].
[96] Inter-American Commission, "Chapter IX: Situation of Haitian Migrant Workers and their Families," *supra* note 85, para. 80.
[97] See Human Rights Committee, *Concluding Observations of the Human Rights Committee: Dominican Republic* 26/04/2001 CCPR/CO/71/DOM, para. 17; UN Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Dominican Republic 26/08/99,*

sugar plantations known as *bateyes* or in the informal/underground economic sectors, which offer inadequate and irregular incomes. Even if overt racism did not exist, most ethnic Haitians simply lack the disposable income needed to travel to all the necessary government offices throughout the Dominican Republic to obtain the necessary documentation.[98] As a practical matter, free or affordable legal assistance is unavailable.

Furthermore, in view of the prevalence of discriminatory deportation sweeps for anyone who looks Haitian or lacks valid identity documents, many ethnic Haitians are afraid of traveling too far from their residences and/or places of employment.[99] The pervasive fear of deportation deters many from traveling to major towns for the purposes of registering a child, collecting evidence for birth registration, or making sworn statements before government officials.

D. ***Unconstitutional Policy***

The Dominican Republic's pattern and practice of discriminating against persons of Haitian descent who seek birth registration as a means of effectively proving their nationality also contravenes its own constitutional and legislative norms. According to Article 11 of the Constitution of the Dominican Republic, all persons born on Dominican territory are Dominican citizens except for the legitimate children of foreign diplomats residing in the country or of parents who are "in transit."[100] Article 9 of the Civil Code defines Dominicans as those persons born in the territory of the Republic, regardless of the nationality of their parents, and provides that Dominican citizenship can be established with a birth certificate.[101] The Dominican Republic therefore applies the *jus solis* method of granting citizenship where citizenship is determined by birth on a country's territory. The government has consistently affirmed that the term "in transit"

CERD/304/Add.74, para. 11; Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Dominican Republic 12/1/97* E/C.12/1/Add.16, para. 17.

[98] Inter-American Commission, *Annual Report of the Inter-American Commission on Human Rights*, "Chapter V(a): Dominican Republic," Inter-Am C.H.R. OEA/Ser.L/V/II.114 doc. 5 rev., 16 April 2002, para. 77 ("the cost entailed and the documentation problems of parents make these requirements impossible to meet").

[99] Inter-American Commission, "Chapter IX: Situation of Haitian Migrant Workers and their Families," *supra* note 85, para. 88 ("The Commission notes with concern that the Dominican States continues its practice of mass deportations…."); Human Rights Watch, *'Illegal People,' supra* note 81, at 11 ("Snatched off the street, dragged from their homes, or picked up from their work-places, 'Haitian-looking' people are rarely given a reasonable opportunity to challenge their expulsion during these wholesale sweeps. The arbitrary nature of such actions, which myriad international human rights bodies have condemned, is glaringly obvious…Suspected undocumented migrants are singled out for deportation based on the color of their skin. Once in migration or military custody, they are frequently granted little or no opportunity to prove their legal status").

[100] *Constitution of the Dominican Republic* (1994). The exact language of Article 11(1) is as follows: "Dominicans are: All the persons who were born on the territory of the Republic, with the exception of the legitimate children of foreign diplomats resident in the country or those who are transiting through it." ["Todas las personas que nacieren en el territorio de la República, con excepción de los hijos legítimos de los extranjeros residentes en el país en representación diplomática o los que están de tránsito en él."]

[101] *Codigo Civil de la República Dominicana* [Civil Code of the Dominican Republic], Article 9, para. 1.

is defined by Immigration Act No. 95 of April 14, 1939, and Immigration Regulation No. 279 of May 12, 1939, which categorize as "in transit" foreigners who try to enter the Dominican Republic with the principal objective of traveling to an exterior destination; business or leisure visitors; persons who are actively serving in foreign navy or air forces; and temporary workers and their families.[102] The Dominican Republic has referred to this legislation before numerous international and regional human rights treaty bodies to explain its nationality policy, noting that "Aliens are defined under [Immigration] Act No. 95 of 1 June 1930 and Immigration Regulation No. 279, which also…[define] those who are considered to be in transit…. A period of 10 days will be considered ordinarily sufficient to pass through the Republic."[103]

In spite of these clear constitutional and regulatory provisions, however, individuals of Haitian descent born on Dominican territory have been arbitrarily barred from accessing Dominican nationality. The Dominican Republic has repeatedly claimed that the parents of children of Haitian descent born on Dominican territory are "in transit," even when these parents (and *their* parents) were themselves born on Dominican territory and have lived in the Dominican Republic for decades. As the Inter-American Commission has observed, "[i]t is not possible to consider persons who have resided for several years [let alone, decades] in a country in which they have developed innumerable contacts of all types to be in transit."[104] This is especially true when one considers that the timeframe for being "in transit" is only ten days.[105] In its "breathtaking misreading of the constitution's language,"[106] the Dominican government has relegated persons of Haitian descent to what the Inter-American Commission has called a "status of permanent illegality."[107] Moreover, by implausibly attempting to justify its discriminatory denial of nationality as constitutionally-impelled, the Dominican government has elevated

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[102] *Ley de Inmigración No. 95 del 14 de Abril de 1939* [Law No. 95 on Immigration of April 14, 1939], Article 3. The exact language is: "Foreigners who wish to be admitted will be Immigrants unless they fall under one of the following Non-Immigrant classes: 1. Visitors or business, pleasure, or curiosity trips; 2. Persons who are transiting through the territory of the Republic on their way to the exterior; 3. Persons who are actively serving in foreign naval or air forces; 4. Temporary workers and their families." The language of *Acto No. 279 del 12 de Mayo del 1939 Reglamento de la Ley de Inmigración* [Act No. 279 of May 12, 1939 on the Regulation of the Law on Immigration] Section 5 (a) is similar: "Those foreigners who try to enter the Republic with the principal aim of traveling through the country en route to a foreign destination will be granted transitory privileges. These privileges will be granted even though the transient person will not be admissible as an Immigrant, so long as his entry is not damaging to public health or safety. The foreigner will be required to declare his destination, the transportation means used, and the date and time of his departure from the Republic. A period of 10 days will be considered ordinarily sufficient to transit through the country."

[103] UN Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Dominican Republic 27/04/2000*, UN Doc. CCPR/C/DOM/99/3, para. 65. See also UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Dominican Republic 26/04/2000,* UN Doc. CCPR/CO/71/DOM, para. 18; and UN Human Rights Committee, *Follow-up State Reporting: Action By State Party: Dominican Republic,* UN Doc. CCPR/CO/71/Dom/Add.1(2002), para. 57.

[104] Inter-American Commission, "Chapter IX: Situation of Migrant Workers and Their Families in the Dominican Republic," *supra* note 85, para. 353.

[105] *Acto No. 279*, Section 5 (a), *supra* note 102.

[106] Human Rights Watch, '*Illegal People,' supra* note 81, at 23.

[107] Inter-American Commission, "Chapter IX: Situation of Migrant Workers and Their Families in the Dominican Republic," *supra* note 85, para. 350.

unlawful practice to the status of official policy.[108] In so doing, it has incurred the repeated criticism of intergovernmental monitoring organs.[109]

In sum, the policy of the Dominican Republic was—at all times relevant to the violations alleged in this case—to deny persons of Haitian descent access to nationality. As direct discrimination, government officials have routinely and systematically denied persons of Haitian descent access to nationality—and the birth registration documents necessary to prove it—because of their race. As indirect discrimination, government rules concerning birth registration have severely disadvantaged persons of Haitian descent absent any objective and reasonable justification.

III. **Racial Discrimination in Access to Nationality is a Global Problem**

The instances of racial discrimination in access to citizenship at issue in this case are not isolated phenomena. To the contrary, government discrimination on the basis of race in granting access to citizenship is a problem in virtually every region of the world. Victims of discrimination in access to nationality are vulnerable to deportation, and frequently lack access to legal counsel. Accordingly, they rarely seek legal redress, and few cases have been presented to courts on their

[108] Indicative of this policy is a statement before the UN CERD in 1999 by a government official, who uniformly categorized all persons of Haitian descent—even those whose families had been living in the Dominican Republic for generations—as "temporary workers" born of "foreigners," and therefore not entitled to Dominican nationality (UN CERD, *Acta Resumida de la 1365ª Sesión: Dominican Republic, Latvia 01/09/99*, UN Doc. CERD/C/SR.1365, para. 17). Among the claims of this official were (i) that only those children born to foreign *documented* workers who could not pass along their nationality were entitled to Dominican nationality; (ii) that Dominican migrant law considered temporary workers as being "in transit" but non-immigrant; and (iii) that children born to unions between an ethnic Haitian and an ethnic Dominican could access their right to Dominican nationality only if the Dominican-born parent could produce accredited citizenship documents. These statements are not discriminatory on their face; rather, they are indirectly discriminatory in that they seek to group Dominican-born, ethnic Haitians who have a constitutional right to Dominican nationality with recently-arrived migrant workers whose right to Dominican nationality is not automatic. Additionally, the language used by the government official contravenes the *jus solis* principle enshrined in the Dominican constitution by restricting the category of people who can benefit from the *jus solis* principle. The exact language used by the government official before the CERD was as follows: "Not all persons born or living on Dominican territory have the right to nationality… A person born in the country to a foreigner who passes along his or her nationality is not Dominican; but he who is born in the country to a legal immigrant is Dominican if the legal immigrant does not pass along his original nationality. Since the immigration law considers temporary workers and their families Non-Immigrant or in transit, the children of Haitian workers are not Dominican, a situation fully in line with paragraph 3 of the Convention." In another forum on a separate occasion, a government official stated, contrary to Dominican and international law, "If the parents are illegal, so is the child, even if said child is born here." See Inter-American Commission, Chapter V: Situation of Haitians in the Dominican Republic, Inter-Am. C.H.R. OEA/Ser.L/V/II.81 Doc 6 rev. 1 (14 February 1992).

[109] See United Nations Human Rights Committee, *Concluding Observations of the Human Rights Committee: Dominican Republic 26/04/2000* UN Doc. CCPR/CO/71/DOM, para. 18 (expressing concern at "the abuse of the legal notion of 'transient' aliens'….[S]uch persons may be born in the Dominican Republic to parents who were born there but are still not considered to be nationals of the Dominican Republic"); UN Committee on Economic, Social, and Cultural Rights, *Concluding Observations of the Committee on Economic, Social, and Cultural Rights: Dominican Republic 12/12/97*, UN Doc. E/C.12/1/Add.16, para. 17 ("the Committee is particularly concerned about the situation of children who, due to the restrictive interpretation of article 11 of the Constitution by the authorities, do not receive Dominican nationality on the grounds that they are children of foreigners born in transit"); Inter-American Commission on Human Rights, "Chapter IX: Situation of Migrant Workers and Their Families in the Dominican Republic," *supra* note 85, para. 363. ("It is not possible to consider persons who have resided for years in a country in which they have developed innumerable contacts of all types to be in transit. Consequently, numerous children of Haitian origin are denied fundamental rights, such as the right to nationality of the country of birth, access to health care, and access to education").

behalf. This case provides an unprecedented opportunity for a judicial body with the prestige and authority of this Court to address this important question from the perspective of international human rights law. Following are several examples of racial discrimination in access to nationality:

- The *Rohingya Muslim minority of Burma* is one such ethnic group. Although nearly all Rohingya or their parents were born in the northern Ankara state of Burma, have resided there, and have family there, the government refuses to recognize them as citizens, categorizing them instead as "illegal migrants." The 1983 Burmese Citizenship Act established three hierarchical categories of citizenship—full citizenship, associate citizenship, and naturalized citizenship[110]—from which the Rohingya are effectively excluded. The government claims that the Rohingya are ineligible for citizenship because they (a) are not considered a national ethnic group as provided by Section 3 of the 1982 citizenship law and thus cannot be considered as full citizens; (b) they were not eligible for citizenship under the 1948, and had not applied for citizenship under that act, and thus are not eligible for associate citizenship; and (c) few among them possess the requisite documentation that provides conclusive evidence of entry and residence prior to January 1948.[111] The government's interpretation of the ostensibly race-neutral citizenship laws has rendered the Rohingya ethnic group potentially stateless, as no other state recognizes them as nationals. Marked as foreigners by the Burmese government, the Rohingya suffer from restricted freedom of movement, limited access to secondary education and employment, forced labor, and arbitrary confiscation of their property. Moreover, the 1982 law denies citizenship to children born to non-citizens, thereby perpetuating the citizenship crisis among future generations of Rohingya.[112]

- A similar situation affects the *Meskhetian minority in the Russian Federation*. As nationals of the former Soviet Union, the Meskhetians were entitled to acquire citizenship of the Russian Federation under the 1991 Citizenship Law. Article 13(1) of the law provided that former Soviet citizens permanently residing in the Russian Federation on the date the law entered into force and who did not decline their Russian citizenship within a year were deemed Russian citizens. Despite the fact that the Meskhetians were

[110] *Full citizenship* is granted to those whose parents were both citizens; *associate citizenship* (not defined in the 1982 law, but under the 1948 Union Citizenship Act) is granted to those whose ancestors settled in Burma after 1823, *naturalized citizenship* is granted to those for whom at least one parent was a citizen and the other a foreigner, or where one parent was an associate citizen and the other a naturalized citizens, or where both parents are naturalized citizens, or where one parent was a naturalized citizen and the other a foreigner.
[111] Amnesty International, *The Rohingya Minority: Fundamental Rights Denied* (May 2004).
[112] Human Rights Watch, *Living in Limbo: Burmese Rohingya in Malaysia* (August 2000, Vol. 12 No. 4 (C)).

permanent residents of the Russian Federation and had not declined Russian citizenship, local administrative authorities denied them equal access to citizenship under the federal law of the Russian Federation. Officials in the Krasnodar Krai region, where most Meskhetians reside, have passed legislation effectively denying Meskhetians access to permanent residence registration on the pretext that they are "stateless," and conceded only temporary residence permits of 3 months. This discriminatory use of the registration requirement is used to sever the connection between citizenship and the protection of rights, as legal residence registration serves as the basis for access to protection by the state.

- The *Nubian community of Kenya* is composed of more than 100,000 descendants of persons originally from the territory of Sudan who were brought to East Africa as forced conscripts by the British colonial government and resettled in various regions of modern-day Kenya over 100 years ago. "Although the Nubians should be considered as Kenyan citizens under the prevailing laws, the overwhelming majority of them live as *de facto* stateless persons without adequate legal protection. They are systematically denied their right to Kenyan citizenship and to own land."[113] When seeking to assert their right to Kenyan citizenship, Nubians have been requested to produce their grandparents' birth certificates, which are almost impossible to obtain for the majority of Nubians today, as many of their grandparents were born before Kenya began issuing birth certificates. Despite having lived in the territory for more than 100 years, before the modern Kenyan state even came into being, the Nubians are treated as "Kenyans of foreign extraction" and are thus subject to additional documentation requirements than those Kenyans considered to be natural citizens. Treated as non-citizens, and bereft of official recognition as a distinct Kenyan community with a unique culture, language, history, and religion, Kenyan Nubians are prevented from owning land and suffer violations of many fundamental human rights.[114]

- *Thailand's Hill Tribe People*, who include members of more than 13 different ethnic communities, number over one million. Despite being born in Thai territory, almost half of the Hill Tribe people lack Thai citizenship, and are thus unable to vote, buy land, seek

[113] African Society of International and Comparative Law and Minority Rights Group International, *Joint Oral Intervention at UN Commission on Human Rights 59th Session* " (2003).

[114] K. Singo'ei, "Meet the Nubians, Kenya's Fifth-Generation 'Foreigners,'" *East Africa Magazine* (July 15, 2002). See also United Nations Information Service, *Commission on Human Rights Hears from NGOs Charging Violations Around the World*, UN Doc. HR/CN/1017 (April 4, 2003); and Constitution of Kenya Review Committee, *Constituency Committee Reports : Kitutu Chache Constituency,* "Section 5.3.4: Citizenship."

legal employment, or travel freely. Population registration regulations passed in 1956–from which many Thai people's claims to citizenship derives–effectively excluded those communities living in remote regions, namely that Hill Tribe people, and created doubt about their lawful claim to Thai nationality. In the 1990s, the Thai authorities passed a succession of amendments to the nationality laws that, among other things, required the ability to speak Thai in order to be granted nationality–indirectly discriminating against the ethnically differentiated Hill Tribe communities who spoke their own languages. These communities faced additional hurdles in complying with the bureaucratic nationality requirements, such as providing certificates and other documents.[115] Officials have maligned the Hill Tribe people as drug dealers, environmental criminals, national security threats, and illiterate and uncivilized "foreigners."

- The *Kuwaiti government* applies the classification "Bidun" to several groups of individuals, including descendants from nomadic groups and migrants who have lived in Kuwait for decades and have therefore lost all effective links with their ancestral homes. Kuwait's Nationality Law creates a category of "original Kuwaiti nationals" who are, by virtue of that status, eligible for automatic nationality, resulting in a higher level of rights and protections under Kuwaiti law. "Original Kuwaiti nationals" are "persons who were settled in Kuwait prior to 1920 and who maintained their normal residence there until the date of the publication of the law [May 21, 1959]." The Bidun are among those unable to meet these requirements and have thus been denied automatic nationality. All children of Bidun parents are also considered Bidun, including the children of Kuwaiti mothers and Bidun fathers. Until the mid-1980s, even though they were denied automatic nationality, the Bidun were treated as lawful residents of Kuwait whose claims for citizenship were under consideration. In 1985, the government began applying the provisions of the Alien Residence Law 7/1959 to the Bidun and subsequently issued a series of regulations stripping them of almost all their previous rights and benefits. Commencing in 1986, the government restricted Biduns' eligibility for travel documents and fired all Bidun government employees (except for those employed by the police or the military) who could not provide valid passports; private employers were required to pursue the same policy. In 1987, the government began to refuse Bidun registration for automobiles and

[115] Chayan Vaddhanaphuti and Karan Aquino, *Citizenship and Forest Policy in the North of Ireland* (Paper presented at a special roundtable on Citizenship and Forest Policy at the 7th International Thai Studies Conference "Thailand: Civil Society?" in Amsterdam, the Netherlands, July 6, 1999), at 1. See also Marwaan Macan-Markar, "Thailand: Fear of Expulsion Haunts Hill Tribes," *Asia Times* (30 July 2003); Yindee Lertcharoenchok, "Searching for Identity," *Step-by-Step (Newsletter from the UN Inter-Agency Project on Trafficking in Women and Children in the Mekong Sub*-Region), Fourth Quarter, Issue 5 (2001); and "The Struggle for the Highlands Accused of endangering the environment, Thailand's tribespeople face eviction and an uncertain future," *Asiaweek* Vol. 25 No. 43 (October 29, 1999).

applications for drivers' licenses, severely restricting their freedom of movement. That same year, Bidun children were barred from attending public schools. In 1998, this ban was extended to the university level. The government has also instructed all private clubs and associations to dismiss any Bidun members.[116]

- The *Banyamulenge* are a Kinyarwanda-speaking ethnic group many of whose members have resided in the northeastern corner of the *Democratic Republic of the Congo* (DRC, formerly Zaire) since before the creation of colonial boundaries. Although the Banyamulenge were considered citizens under previous constitutions and law, they were deprived of their nationality in 1981, when the Zairian government limited citizenship to those individuals who could prove that their ancestors belonged to an ethnic group "known to exist" within the border of the territory later known as Zaire. This change in citizenship laws affected more than 1.5 million Banyamulenge, who were no longer automatically recognized as Zairians; in principle, they had to formally apply and be granted citizenship. Although this law was not actively enforced during the 1980s, it represented an official discriminatory stance toward the Banyamulenge that would only harden in the next two decades. Following the sharp influx of Rwandan refugees to the DRC after the 1994 genocide, the leaders of other ethnic groups increasingly challenged the rights of Banyamulenge to Congolese citizenship. On April 28, 1995, the parliament passed a law preventing these recent arrivals from claiming citizenship, and further defining the entire Banyamulenge ethnic group as "immigrants who have acquired Zairian nationality fraudulently" – forbidding them to sell or trade any assets and barred them from political and military office. In 1998, a draft constitution once again stripped most Banyamulenge of citizenship. Violations of the rights of Banyamulenge are seen as a pivotal factor in sparking the civil war that embroiled the country and region.[117]

- Over 100,000 *Bhutanese of ethnic Nepali origin* were arbitrarily deprived of their nationality and forcibly expelled from Bhutan in the early 1990s in clear violation of international law. The Bhutanese government stripped southern Bhutanese of their citizenship in order to expel and exclude an unpopular ethnic and religious minority

[116] See Human Rights Watch, *Kuwait: Promises Betrayed: Denial of Rights of Bidun, Women, and Freedom of Expression* (Volume 12, Number 2(E) October 2000); Human Rights Watch, *The Bedoons of Kuwait: "Citizens Without Citizenship,"* (August 1995); and United States Department of State, *Country Reports on Human Rights Practices – 2003: Kuwait* (released February 25, 2004).

[117] Jeremy Sarkin, *Toward Finding a Solution for the Problems Created by the Politics of identity in the Democratic Republic of the Congo (DRC): Designing a Constitutional Framework for Peaceful Cooperation* (presented at a workshop titled "Politics of Identity and Exclusion in Africa: From Violent Confrontation to Peaceful Cooperation," University of Pretoria, 25-26 July 2001).

(Hindus who are ethnically and culturally distinct from the majority ethnic group and ruling elite, the Buddhist Ngalongs). In 1977 and 1985, Bhutan introduced two new Citizenship Acts that narrowed the requirements for nationality in such a way that the northern Bhutanese were effectively barred access.[118] In particular, these Acts retroactively made 1958 the cut-off year for determining citizenship. In order to be granted citizenship, it was now necessary to produce land tax receipts or other proof of residency in Bhutan dating from on or before December 31, 1958—a requirement most ethnic Nepali Bhutanese found hard to fulfill, given how removed they were from the mainstream Bhutanese society and bureaucracy.[119]

Conclusion

For the foregoing reasons, the Justice Initiative respectfully submits that this Court should find that Articles 1(1) and 24 of the American Convention, taken together with Article 20(1), prohibit racial discrimination in access to nationality, and that the Dominican Republic's policy of systematically targeting a particular ethnic group with both direct and indirect discrimination in access to nationality violates those provisions**.**

Dated: New York, New York
April 14, 2005

OPEN SOCIETY JUSTIVE INITIATIVE

By: _____

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[118] Among these requirements were twenty years of residency in the country, the ability to read, write and speak Dzonkha (the national language) fluently, good knowledge of the history and culture of Bhutan, a good moral character, and "no record of having spoken or acted against the King, country, and people of Bhutan in any manner whatsoever."

[119] Among United Nations organs, see, e.g., the UN Human Rights Committee, *Brooks v. The Netherlands Communication No. 172/1984*, UN Doc. CCPR/C/29/D/172/1984, paras. 12.3 - 16 (finding violation of ICCPR Article 26 on grounds of sex discrimination, even though State party had not intended to discriminate against women); *Simunek et al. v. Czech Republic*, *supra* note 14, para. 11.7 ("the intent of the legislature is not alone dispositive in determining a breach of article 26 of the Covenant. A politically motivated differentiation is unlikely to be compatible with article 26. But an act which is not politically motivated may still contravene article 26 if its effects are discriminatory"); *Althammer v. Austria*, *supra* note 14, para. 10.2 (employing similar reasoning); UN CERD, *General Recommendation No. 19*: *Racial segregation and apartheid (Art. 3*) *18/08/95*, para. 3 ("condition of [unlawful] partial segregation may also arise as an unintended by-product of the actions of private persons"). The principle is well-established in Europe as well. See *Hugh Jordan v. United Kingdom*, *supra* note 19, para. 154.

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