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## SMALLER STEPS TOWARDS PROGRESS IN THE DOMINICAN REPUBLIC: SECURING EQUAL ACCESS TO EDUCATION FOR DOMINICO-HATIAN CHILDREN

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*“Education is a human right with immense power to transform. On its foundation rests the cornerstones of freedom, democracy and sustainable human development.”*

– Kofi A. Annan, Former Secretary-General of the United Nations\*\*

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\*\* Kofi A. Annan, Secretary-General of the United Nations, *Foreword* to UNICEF, THE STATE OF THE WORLD’S CHILDREN 4 (1999), available at <http://www.unicef.org/sowc99/sowc99a.pdf>.

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#### ABSTRACT

*Though the right to education is widely recognized by multiple instruments of international law, difficulties in its implementation persist globally. Adducing motivations of economic growth, social order, and limited resources, sovereign nations violate international law by discriminating on grounds of nationality and immigration status in their delivery of public education services. Only thirty years ago, the United States faced this issue within its borders when the state of Texas refused to allocate funds for undocumented children's education. The U.S. Supreme Court, however, invalidated that law, declaring that the state had not provided sufficient justification for denying a discrete group of children an education provided to all other legal residents. Today, the Dominican Republic faces this same challenge. The Dominican government has perpetuated discriminatory laws against Dominico-Haitian children in a manner that prevents their enrollment in education beyond the fourth grade. By denying the Dominico-Haitian children documents to prove their birth and identity, and by simultaneously requiring this documentation for school enrollment, the Dominican Republic violates their fundamental right to education. Greater enforcement of human rights is necessary to lift multiple generations of children from marginalization and poverty. Isolating the right to education as an international legal claim may provide a more efficient way of enforcing that human right.*

## I. INTRODUCTION

Cross-border migration, driven by the promise of a better life, has become a common practice in the modern world. However, migrants may settle in a new host country only to find that their expectations were misleading. A variety of barriers may cause migrants to be marginalized in the host country, particularly if they lack proper documentation. From the perspective of the host country, this influx of undocumented migrants may threaten economic and social order. A developing country, with a legitimate interest in limiting the resources it allocates to undocumented migrants, may invoke laws or practices as disincentives to control migration. Yet, what types and degrees of disincentives are lawful under international law? At what point do disincentives violate universal human rights?

The Universal Declaration of Human Rights, as well as other instruments of international law, guards the right to education as a fundamental right for all human beings.<sup>1</sup> Although the denial of a meaningful education is not immediately life threatening, it deprives people of an “immense power to transform.”<sup>2</sup> The denial of education undermines the foundations of “freedom, democracy and sustainable human development.”<sup>3</sup> While not as dramatic as torture, it is perhaps just as damaging in the long run. For undocumented migrants, “education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.”<sup>4</sup>

Undocumented migrants’ right to education often clashes with sovereign states’ efforts at allocation of resources. Undocumented migrants seek greater opportunities, including an education for their children, while sovereign states seek to provide better quality education for their original citizens. In particular, developing states with limited resources have incentives to improve education for children of national citizens, rather than rewarding children of undocumented migrants.

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<sup>1</sup> Universal Declaration of Human Rights, art. 26, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights].

<sup>2</sup> Annan, *supra* note \*\*.

<sup>3</sup> *Id.*

<sup>4</sup> U.N. Comm. on Econ., Soc. and Cultural Rights General Comment No. 13, The right to education (Art. 13 of the Covenant) (21st sess.) Nov. 15 – Dec. 3, 1999, E/C.12/1999/10, ¶ 1 (Dec. 8, 1999) [hereinafter CESCR General Comment No. 13]. “Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.” *Id.*

Yet, international law demands that states provide education without discrimination. This standard is not impossible; and this problem is not unique to developing states. As recently as 30 years ago, the United States dealt with litigation on this same challenge.

In May 1975, the state of Texas enacted legislation that allocated education funding for children based on their legal status as citizens or non-citizens.<sup>5</sup> The Texas education laws withheld state funds from the education of children who lacked documentation to prove U.S. citizenship or legality of their entrance into the United States.<sup>6</sup> Additionally, the laws authorized local schools to deny enrollment to undocumented children.<sup>7</sup> When these education laws were challenged, Texas provided several grounds of justification, including that a state may withhold benefits to illegal immigrants “whose very presence within the United States is the product of their own unlawful conduct.”<sup>8</sup> In order to “protect itself from an influx of illegal immigrants,” a state has “an interest in mitigating the potentially harsh economic effects of sudden shifts in population.”<sup>9</sup> Yet in 1982, the Supreme Court of the United States “perceive[d] no national policy that supports . . . denying these children an elementary education” and struck down the discriminatory laws.<sup>10</sup>

While the Court acknowledged that illegal immigrants should not benefit from their illegal conduct, this argument had less force against the minor children brought by illegal immigrants.<sup>11</sup> In addition, despite the difficulty of accommodating an influx of immigrants, illegal aliens are also likely to “underutilize public services, while contributing their labor to the local economy and tax money to the state fisc.”<sup>12</sup> The Court ultimately found that there was insufficient justification for the United States “to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders.”<sup>13</sup> Given that many undocumented children reside indefinitely, the Court questioned what discriminatory education laws “hope[d] to achieve by

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<sup>5</sup> Plyler v. Doe, 457 U.S. 202, 205 (1982).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 219.

<sup>9</sup> *Id.* at 228.

<sup>10</sup> *Id.* at 226.

<sup>11</sup> Plyler, 457 U.S., at 219-20.

<sup>12</sup> *Id.* at 228.

<sup>13</sup> *Id.* at 230. *But see* Lora L. Grandrath, *A New Generation, Illegal Immigrants and Public Education: Is There a Right to the 3 R's?*, 30 VAL. U. L. REV. 749 (1996) (arguing that the *Plyler* Court was incorrect and that the Court imposed an obligation beyond its capacity).

promoting the creation and perpetuation of a subclass of illiterates within [the state's] boundaries, surely adding to the problems and costs of unemployment, welfare, and crime."<sup>14</sup>

Although *Plyler v. Doe* applies U.S. domestic law, it exemplifies international law issues regarding the right to education for the undocumented children of migrants on a global scale.<sup>15</sup> For example, despite the fact that China has ratified two treaties recognizing the right to education, the country faces difficulties handling the influx of illegal immigrants from North Korea.<sup>16</sup> Apart from the issue of asylum, the children of these migrants are unable to register for legal status, and as a direct result, are barred from registering in schools.<sup>17</sup> Additionally, an international legal committee recently found that Kazakhstan needs to improve the quality of the minority language schools, to allocate equal funding to these schools with a greater population of minority groups, and to grant access to higher education without discrimination based on ethnicity.<sup>18</sup> Uncontrollable influxes of migrants fleeing persecution and the presence of ethnic minorities present just two of many difficulties worldwide in implementing the nondiscriminatory right to education.

The Dominican Republic has formally committed to providing equal access to education. The state ratified multiple international treaties recognizing its commitment to human rights, including the right to education. It even imported these formal commitments directly into national law. However, the Dominican Republic has failed to meet those commitments. Under Dominican laws and practices, children who are born within the Dominican territory to ethnically-Haitian parents are denied birth certificates and identity documentation, which are prerequisites to school enrollment. Thus, Dominico-Haitian children suffer from unequal access to education at least at the secondary level.

In response to criticism by the international legal community, the

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<sup>14</sup> *Plyler*, 457 U.S., at 230.

<sup>15</sup> *See id.*

<sup>16</sup> *See* HUMAN RIGHTS WATCH, DENIED STATUS, DENIED EDUCATION: CHILDREN OF NORTH KOREAN WOMEN IN CHINA 6-7 (2008) (explaining the household registration system of the *hukou*. For practical reasons, such as threat of deportation of a parent, children born to at least one North Korean parent cannot obtain their *hukou*, which is required for school enrollment.)

<sup>17</sup> *Id.* at 2-3.

<sup>18</sup> Comm. on the Elimination of Racial Discrimination, Consideration of Reports Submitted by States Parties under Article 9 of the Convention; Concluding Observations of the Committee on the Elimination of Racial Discrimination: Kazakhstan (76th sess.) Feb. 15 – Mar. 12, 2010, CERD/C/KAZ/CO/4-5, ¶ 9 (Mar. 16, 2010).

Dominican Republic has reinforced discrimination by national legislation, overly broad constitutional interpretation, and ultimately by constitutional revision. Both international treaties and intervention by the Inter-American Court have proven ineffective in enforcing the right to education. In fact, the Dominican Republic has contravened its own jurisprudence by first submitting to the Inter-American Court's jurisdiction and later defying an Inter-American Court order. The Dominican Republic continues to violate international law by denying Dominico-Haitian children equal rights to education.

The experiences in the United States, China, Kazakhstan, and the Dominican Republic demonstrate typical resistance to implementation and enforcement of the right to education. Yet human rights lose their meaning if the international community cannot enforce them. While states progressively work toward improving education, they must not deprive any discrete group of a meaningful education. This paper focuses on the Dominican Republic as a case study of the power of international law to address the global problem of educational discrimination. It departs from current litigation strategies addressing nationality rights and suggests a different legal framework – one that severs enforcement of the right to education from the issue of nationality for migrants, and that emphasizes the urgency of enforcing the former even while the latter is pending before judicial and legislative forums.

## II. THE FUNDAMENTAL RIGHT TO EDUCATION IN INTERNATIONAL LAW

*The right to education receives clear recognition in international law.<sup>19</sup> More than sixty years ago, the Universal Declaration of Human Rights (UDHR) explicitly proclaimed that:*

“Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. . . . Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups . . . .”<sup>20</sup>

The right to education is also guarded by other international treaties, including the International Covenant on Economic, Social and Cultural

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<sup>19</sup> See Universal Declaration of Human Rights, *supra* note 1, at art. 26.

<sup>20</sup> *Id.*

Rights (ICESCR)<sup>21</sup> and the Convention on the Rights of the Child (CRC).<sup>22</sup> Many countries further guard this fundamental right in their national constitutions.<sup>23</sup>

A. *The Right to Education: Legal Obligations Under the International Convention on Economic, Social and Cultural Rights and Under the Convention on the Rights of the Child*

The ICESCR further elaborates on state obligations regarding different education levels.<sup>24</sup> First and foremost, primary education “shall be compulsory and available free to all.”<sup>25</sup> Secondary education “shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education.” Higher education should be available “on the basis of capacity.”<sup>26</sup> The CRC reiterates the language regarding primary education as “compulsory and available free to all” and higher education as “accessible to all on the basis of capacity by every appropriate means.”<sup>27</sup> Article 29 of the CRC then establishes education’s capacity to “promote, support and protect the core value of the Convention: the human dignity innate in every child and his or her equal and inalienable rights.”<sup>28</sup> The repetition of the right to education in international treaties reflects a widespread acknowledgement of its significance, especially with regard to children.

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<sup>21</sup> International Covenant on Economic, Social and Cultural Rights, art.13, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force Jan. 3, 1976 [hereinafter ICESCR].

<sup>22</sup> Convention on the Rights of the Child, art. 28, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990 [hereinafter CRC]; Convention on the Rights of the Child, General Comment 1, Article 29(1) Aims of Education, CRC/GC/2001/1, ¶ 1 (Apr. 17, 2001) [hereinafter CRC General Comment 1].

<sup>23</sup> *International law and the right to education*, RIGHT TO EDUCATION PROJECT, <http://www.right-to-education.org/node/234> (last visited Jan. 20, 2012).

<sup>24</sup> ICESCR, *supra* note 21, at art. 13(2).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> CRC, *supra* note 22, at art. 28(1).

<sup>28</sup> *Id.* at art. 29; CRC General Comment 1, *supra* note 22, ¶ 1. See also CRC, *supra* note 22, at art. 29 (providing the aims of education: “the holistic development of the full potential of the child,” which includes the “development of respect for human rights . . . , an enhanced sense of identity and affiliation . . . socialization and interaction with others . . . and [respect for] the environment”).



i. Complying by Progressive Realization of Education to a State's Maximum Capacity

The idea of “progressive realization” seeks a balance between the importance of education and the reality of limited resources available to provide education. Accordingly, the ICESCR obligates a state to “take steps . . . to the maximum of its available resources, with a view to achieving progressively the full realization of the rights” recognized in that treaty – “by all appropriate means,” including through legislative measures.<sup>29</sup> This includes strong imperatives for implementation (“to the maximum” of available resources and “by all appropriate means”), but the language also explicitly recognizes that progressive realization of human rights may be sufficient for treaty compliance.<sup>30</sup> The CRC uses similar language in Article 4, declaring that states “shall undertake all appropriate legislative, administrative, and other measures” to implement the right to education “to the maximum extent of their available resources.”<sup>31</sup> Thus state parties are obligated to provide primary education that is “compulsory and available free to all” as well as higher education by progressive realization as long as it is to the maximum capacity of their resources.<sup>32</sup>

The United Nations Committee on Economic, Social and Cultural Rights (CESCR), the body charged with monitoring and evaluating states’ compliance with the ICESCR, has indicated that the progressive nature of these obligations does not excuse an unfulfilled right to education.<sup>33</sup> Rather, a progressive obligation is a “specific and continuing obligation.”<sup>34</sup> Though the CESCR’s General Comments are not legally binding, they are influential, providing “guidance and explicit language toward effective implementation and compliance with treaty norms.”<sup>35</sup>

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<sup>29</sup> ICESCR, *supra* note 21, at art. 2(1).

<sup>30</sup> *See id.*; *see also* U.N. Comm. on Econ., Soc., and Cultural Rights General Comment No. 3, The Nature of States Parties Obligations (Art. 2, Para. 1, of the Covenant) (5th sess.) Dec. 14, 1990, E/1991/23, annex III, ¶ 9 (Dec. 14, 1990) [hereinafter CESCR General Comment 3].

<sup>31</sup> CRC, *supra* note 22, at art. 4. Article 1 provides that for the purposes of the CRC, “child” means “every human being below the age of eighteen years . . .” *Id.* at art. 1. Thus the protection by nondiscrimination discussed in this paragraph applies to all of these children below the age of eighteen.

<sup>32</sup> ICESCR, *supra* note 21, at art. 13(2).

<sup>33</sup> CESCR General Comment No. 13, *supra* note 4, ¶ 44.

<sup>34</sup> *Id.*

<sup>35</sup> Sital Kalantry, Jocelyn E. Getgen & Steven Arrigg Koh, *Enhancing Enforcement of Economic, Social and Cultural Rights Using Indicators: A Focus on the Right to Education in the ICESCR*, 32 HUM. RTS. Q. 253, 267 (2010)

ii. Distinguishing Nondiscrimination as an Immediate Obligation  
Deriving from Children's Right to Education

The ICESCR clearly isolates the principle of nondiscrimination as an immediate obligation – not a progressive one.<sup>36</sup> Article 2(2) of the ICESCR states that state parties “undertake to guarantee” that the right to education “will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>37</sup> In fact, within the wide “range of human rights obligations upon which primary education should be based,” Katarina Tomasevki, former Special Rapporteur on the Right to Education, explicitly emphasized the principle of nondiscrimination.<sup>38</sup> The CESCR also noted that primary schools “must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination . . . .”<sup>39</sup>

Article 2 of the CRC also forbids discrimination “of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”<sup>40</sup> Further, Article 2 of the CRC imposes a positive duty on states to ensure children’s protection from discrimination based on “the status, activities, expressed opinions or beliefs of the child’s parents, legal guardians, or family members.”<sup>41</sup> Thus, although progressive realization applies to some aspects of the right to education, progressive realization does not apply to nondiscrimination.

The CESCR characterized education as “both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which

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[hereinafter Kalantry].

<sup>36</sup> ICESCR, *supra* note 21, at art. 2(2).

<sup>37</sup> *Id.*

<sup>38</sup> Special Rapporteur on the Right to Education, *Preliminary Report of the Special Rapporteur on the Right to Education, Ms. Katarina Tomasevski, Submitted in Accordance with Commission on Human Rights Resolution 1998/33*, U.N. Comm’n on Human Rights (55th session, Item 10 of the Provisional Agenda), E/CN.4/1999/49, ¶ 50 (Jan. 13, 1999) [hereinafter *Preliminary Report of the Special Rapporteur*].

<sup>39</sup> CESCR General Comment No. 13, *supra* note 4, ¶ 6(b) (noting nondiscrimination as one of the three overlapping dimensions of Accessibility to Education, which composes part of the 4-A Framework to the right to education. The remaining two dimensions of Accessibility are physical accessibility and economic accessibility.)

<sup>40</sup> CRC, *supra* note 22, at art. 2(1).

<sup>41</sup> *Id.* at art. 2(2).

economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.”<sup>42</sup> Accordingly the international law provided by ICESCR and the CRC stresses that “development of a system of schools at all levels shall be actively pursued,”<sup>43</sup> and that states must not discriminate in the implementation of the right to education. Although progressive realization may be inevitable for some countries due to limited resources, denying education to a discrete group of children violates an immediate obligation of international law as reflected in these treaties.

*B. Proposed Frameworks to Measure Implementation of the Right to Education*

The concept of progressive realization, however necessary, can pose a major practical obstacle to the justiciability of ICESCR rights; states with limited resources may engage in progressive realization and still be in compliance with the treaty.<sup>44</sup> One method of dealing with this obstacle is by carefully delineating its applicability, i.e. distinguishing “progressive realization” obligations from “immediate” obligations.<sup>45</sup> Through a clearer assessment of a state’s implementation, such a distinction would aid enforcement of ICESCR rights, including education.<sup>46</sup> Different frameworks have arisen to help make this distinction.

*i. A Minimum Core Obligation of Nondiscrimination*

Responding to criticism that a state’s limited resources create difficulty in enforcing economic, social and cultural rights (ESCRs),<sup>47</sup> the CESCR adopted nonbinding, yet influential, “minimum core obligations” such that all state parties must immediately “ensure the satisfaction of, at the very least, minimum essential levels of each of the rights,” including basic education.<sup>48</sup> The first of the minimum core obligations for the right to education is “to ensure the right of access to public educational institutions and program[s] on a non-discriminatory basis[.]”<sup>49</sup> Under this framework, if a state provides education in a

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<sup>42</sup> CESCR General Comment No. 13, *supra* note 4, ¶ 1.

<sup>43</sup> *Id.* at ¶ 25.

<sup>44</sup> Kalantry, *supra* note 35, at 256.

<sup>45</sup> *Id.* at 257.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 271.

<sup>48</sup> CESCR General Comment 3, *supra* note 30, ¶ 10.

<sup>49</sup> CESCR General Comment No. 13, *supra* note 4, ¶ 57. The remaining four

discriminatory manner, the state does not meet its “minimum core obligations” and is automatically not in compliance with the treaty.

ii. Isolating the Obligation of Non discrimination in Education  
Under the “4-A Scheme”

Katarina Tomasevki proposed another framework called the “4-A scheme,” which incorporates most of the “minimum core obligations” and provides a comprehensive framework for assessment of the right to education.<sup>50</sup> The 4-A framework contains four essential features that primary schools should aim to exhibit: Availability, Accessibility, Acceptability and Adaptability.<sup>51</sup> Although this framework is not legally binding, the CESCR has adopted it.<sup>52</sup> The 4-A Framework provides that states must make education Available with the capacity to provide for all school-age children, Accessible without discrimination, Acceptable in exhibiting respect for individual students and parents, and Adaptable to constantly changing and evolving realities.<sup>53</sup> Naturally, these factors often overlap. For example, where too few schools are Available, girls are less likely to have Access to education than boys.<sup>54</sup> Yet while state parties to the ICESCR are encouraged to adopt the 4-A Framework, the “precise and appropriate application of the terms will depend upon the conditions prevailing in [the] particular State.”<sup>55</sup>

Consequently, the enforcement of the right to education is not uniform across all states. When a nation’s resources are limited, there is likely an interplay between Availability and Accessibility. Extending education to a broader range of people (greater Accessibility) may exceed the limits of current Availability, or else stretch thin the resources available for each person’s education. This tension may often explain

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minimum core obligations are: (2) to conform education to the Article 13(1) objectives; (3) to provide free and compulsory primary education for all; and (4) to implement a national education strategy to provide higher education; and (5) to ensure free choice of education. *Id.*

<sup>50</sup> Kalantry, *supra* note 35, at 274.

<sup>51</sup> *Preliminary Report of the Special Rapporteur*, *supra* note 38, ¶ 50. *See also* Kalantry, *supra* note 35, at 270-74 (discussing several other proposed frameworks for assessing and enforcing economic, social and cultural rights).

<sup>52</sup> Kalantry, *supra* note 35, at 274 (supporting the 4-A Framework to enhance enforcement of economic, social and cultural rights, including the right to education, and providing textual support from the ICESCR to strengthen this approach).

<sup>53</sup> *Preliminary Report of the Special Rapporteur*, *supra* note 38, ¶¶ 51-74.

<sup>54</sup> *Id.* ¶ 55.

<sup>55</sup> CESCR General Comment No. 13, *supra* note 4, ¶ 6.

discrimination, but does not excuse it. Nondiscrimination is an immediate obligation.<sup>56</sup>

iii. Both Discriminatory Laws and Failure to Redress De Facto  
Discrimination Constitute Violations of the Right to Education  
in International Law

The commitment to nondiscrimination is explicit in the text of both the ICESCR and the CRC, but what if an influx of migrants threatens a nation's efforts to maintain a steady economy and social order? The CESCR, noting Article 2 of the CRC, upholds the principle of nondiscrimination and extends the right to education "to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status."<sup>57</sup> This obligates states to provide education without discrimination based on national or ethnic origin, birth or other status, including migrant status.

Discrimination exists in introducing or failing to repeal legislation that discriminates against individuals or groups, including illegal non-nationals.<sup>58</sup> Additionally, the "failure to take measures which address de facto educational discrimination" against illegal, as well as legal, non-nationals also violates a State party's obligations towards the right to education.<sup>59</sup> The CESCR further provides that State parties to the ICESCR should "closely monitor education – including all relevant policies, institutions, [programs], spending patterns and other practices" to ensure that states are not directly discriminating or failing to redress de facto discrimination.<sup>60</sup>

C. *Migration: At a Crossroads between Human Rights and State  
Sovereignty*

While international law traditionally recognizes a state's sovereignty in establishing national migration law,<sup>61</sup> state sovereignty must sometimes give way to competing human rights interests.<sup>62</sup> In fact, litigation has recently demonstrated that human rights may "trump"

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<sup>56</sup> ICESCR, *supra* note 21, at art. 2(2).

<sup>57</sup> CESCR General Comment No. 13, *supra* note 4, ¶ 34.

<sup>58</sup> *See id.*

<sup>59</sup> *See id.* ¶ 59.

<sup>60</sup> *Id.* ¶ 37.

<sup>61</sup> William J. Aceves, *Relative Normativity: Challenging the Sovereignty Norm Through Human Rights Litigation*, 25 HASTINGS INT'L & COMP. L. REV. 261, 264 (2002).

<sup>62</sup> *Id.* at 265.

sovereignty in both civil and criminal international law.<sup>63</sup> The Human Rights Committee, which monitors states' compliance with the International Covenant on Civil and Political Rights (ICCPR), has held that "once aliens are allowed to enter the territory of a State, they are entitled to the rights set out in the Covenant."<sup>64</sup> Thus, the ICCPR supports the contention that states must respect and protect the human rights of all people within their borders, regardless of alien status.<sup>65</sup> This would include the right to education of undocumented migrants.

i. Developing Countries May Not Have Enough Jobs for Everyone,  
Yet Cannot Exploit a Cheap Labor Source while Refusing  
Education

Article 2(3) of the ICESCR recognizes one explicit distinction between nationals and migrants, yet this limited distinction does not override the obligation of nondiscrimination.<sup>66</sup> "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."<sup>67</sup> The same distinction is also implicit in Article 6's treatment of the right to work, which is clearly an economic right.<sup>68</sup> Although one might argue that economic rights bleed into human rights, the Article 2(3) and Article 6 basis for discrimination should clearly have a narrow application and should not apply to education.<sup>69</sup> Further, the CESCR addressed the Article 2 distinction and explicitly provided that the principle of nondiscrimination still "appl[ies] to employment opportunities for migrant workers and their families."<sup>70</sup> Thus, distinguishing between nationals and non-nationals

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<sup>63</sup> *Id.* at 272.

<sup>64</sup> U.N. Human Rights Comm. General Comment No. 15: The Position of Aliens Under the Covenant, ¶ 6 (Nov. 4, 1986), *in* 1 Human Rights Instruments: Compilation of General Comments and General Recommendations Adopted by Human Rights Bodies, U.N. Doc. HRI/GEN/1/Rev.9 (May 27, 2008) (stating "the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.").

<sup>65</sup> Ryszard Cholewinski, Jillyanne Redpath, Sophie Nonenmacher, & John Packer, *The International Normative Framework with Reference to Migration in the Greater Caribbean*, *in* INTRA-CARIBBEAN MIGRATION AND THE CONFLICT NEXUS 2, 4-5 (Taryn Lesser, Berta Fernández-Alfaro, Lancelot Cowie & Nina Bruni eds., 2006) [hereinafter Ryszard].

<sup>66</sup> *Id.* at 13; *see* ICESCR, *supra* note 21, at art. 2(3).

<sup>67</sup> ICESCR, *supra* note 21, at art. 2(3) (emphasis added).

<sup>68</sup> Ryszard, *supra* note 65, at 13.

<sup>69</sup> *Id.*

<sup>70</sup> U.N. Comm. on Econ., Soc., and Cultural Rights General Comment No. 18, The Right to Work (Article 6 of the International Covenant on Economic, Social

even for economic rights is only justifiable in a limited context, where necessary and proportional to meet legitimate state interests.<sup>71</sup> Outside this context, all rights, including the right to food, clothing and housing, the right to health, and the right to education, are nondiscriminatory.

Developing states may limit documented migrants entering their territories. This may even support the progressive realization of human rights for those already residing in their territory. However, the nondiscrimination principle of Article 2(2) guards the right to education for nationals and undocumented migrants equally.<sup>72</sup> It also binds states to an immediate obligation of nondiscrimination.<sup>73</sup> The context and spirit of Article 2 plainly preclude the use of Article 2(3) as a blanket allowance for countries with limited resources to provide discriminatory education services.<sup>74</sup> Migrants often serve as cheap labor in their host countries.<sup>75</sup> Article 2(3) would be absurd if it allowed states to exploit migrants as an economic resource while denying the children of those migrants a right to education. Despite national sovereignty in migration law, a host state must provide the same education to its undocumented migrants as it does to its nationals.

ii. Isolating the Legal Claim of Discrimination in Education to Better Enforce Human Rights

Effective enforcement of fundamental human rights requires isolating particular legal claims. This can be complicated because many interconnected legal issues arise with cross-border movement. Inevitably, this paper includes discussion of claims to nationality or citizenship, because those claims overlap with claims for education. A host country's refusal to grant nationality to children may prevent those children from obtaining documentation of identification. The lack of documentation may become a barrier to school enrollment.

Nonetheless, conflating legal claims results in ineffective enforcement. This paper argues for enforcing the right to education discretely, separating it from the more complex issue of migrants' claims to permanent residence and nationality. Particularly, this paper discusses the legal obligation a host country has to provide children with

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and Cultural Rights) (35th sess.) Nov. 15 – 25, 2005, E/C.12/GC/18 E/CE/1991/23, ¶ 18 (Feb. 6, 2006).

<sup>71</sup> Ryszard, *supra* note 65 **Error! Bookmark not defined.**, at 13.

<sup>72</sup> *Id.*; see ICESCR, *supra* note 21, at art. 2(2).

<sup>73</sup> See ICESCR, *supra* note 21, at art. 2(2).

<sup>74</sup> See *id.* at art. 2(2), 2(3).

<sup>75</sup> See *e.g.*, Ryszard, *supra* note 65, at 325 (noting that in the Dominican Republic, Haitian migrants do the unfavorable work that Dominicans choose not to do).

education when those children are born within that country's borders to undocumented migrant parents.

### III. THE DOMINICAN REPUBLIC: UNDOCUMENTED CHILDREN'S STRUGGLE TO ACCESS EDUCATION

The Dominican Republic and Haiti share one Caribbean island, and Haitians have historically provided a cheap source of labor for the Dominican Republic.<sup>76</sup> Through bilateral agreements between Haiti and the Dominican Republic, Haitians worked in Dominican plantations for the sugar cane harvest as late as the tail-end of the twentieth century.<sup>77</sup> Eventually, the plantation workers, hired for year-round tasks by sugar cane companies, began living in the Dominican Republic in permanently impoverished, marginalized communities called bateyes.<sup>78</sup> As of 2008, an estimated 800,000 Haitians lived in the Dominican Republic, and at least 280,000 Dominican-born people of Haitian descent lacked documentation to verify nationality.<sup>79</sup> These numbers are likely higher today after the devastating earthquake of 2010 in Haiti.

The Dominican Republic is not a wealthy country and 34.4 percent of its population lives in poverty.<sup>80</sup> Because of limited resources, the influx of undocumented immigration is bound to create difficulty in providing for the well-being of the Dominican Republic's growing population. The Dominican Republic received criticism after Amnesty International published a report highlighting human rights violations

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<sup>76</sup> AMNESTY INTERNATIONAL, DOMINICAN REPUBLIC: A LIFE IN TRANSIT - THE PLIGHT OF HAITIAN MIGRANTS AND DOMINICANS OF HAITIAN DESCENT 4 (Mar. 21, 2007) [hereinafter A LIFE IN TRANSIT], available at <http://www.amnesty.org/en/library/asset/AMR27/001/2007/en/ad444c48-d3ad-11dd-a329-2f46302a8cc6/amr270012007en.pdf>.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Human Rights Advocates, Committee on the Elimination of Racial Discrimination, *2008 Review of the Dominican Republic*, ¶ 1, <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0C CYQFjAB&url=http%3A%2F%2Fwww2.ohchr.org%2Fenglish%2Fbodies%2Fcerd%2Fdocs%2Fngos%2FHRAAdvocates.doc&ei=nzgbT-j2McXm0gHX-vGYCw&usg=AFQjCNGIyfq2ROdueDaQfe0E9bl15k-CZA&sig2=pfQqCrt1Bf3RbSICbKb8xw> (last visited Sept. 22, 2012) [hereinafter Human Rights Advocates].

<sup>80</sup> Central Intelligence Agency, *Dominican Republic, THE WORLD FACTBOOK*, <https://www.cia.gov/library/publications/the-world-factbook/geos/dr.html> (last visited Sept. 22, 2012).



suffered by Haitian migrants and Dominicans of Haitian descent.<sup>81</sup> Though the report focused primarily on the plight of migrant workers, it brought considerable attention to a new migration law at odds with the Dominican Republic's international legal obligations.<sup>82</sup>

A. *Dominico-Haitians in the Dominican Republic Live in a Status of "Permanent Illegality"*

Haitian migrants enter the Dominican Republic both legally and illegally, both to visit short-term and to reside long-term.<sup>83</sup> Over the years, they have established several different communities in the Dominican Republic:<sup>84</sup> (1) a very small group of documented legal migrants mostly based in Santo Domingo, (2) a large Haitian-born group of undocumented, long-term migrants; and (3) a transient population of temporary migrant workers.<sup>85</sup> In addition to these three migrant groups, there is a large number of Dominico-Haitians: people who are ethnically Haitian yet were born in the Dominican Republic.<sup>86</sup> A Dominico-Haitian may have some combination of Haitian, Dominico-Haitian or Dominican parents; some Dominico-Haitian families have lived in the Dominican Republic for generations.<sup>87</sup> What these Dominico-Haitians have in common is that despite being born within the territory of the Dominican Republic, they have limited access to fundamental rights because of Dominican laws and practices.<sup>88</sup>

The communities that have grown out of migration from Haiti encounter numerous legal issues. Haitians and Dominico-Haitians reportedly suffer from racism, violence, and mass expulsions,<sup>89</sup> and

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<sup>81</sup> See Comm. on the Elimination of Racial Discrimination, Dominican Republic's Combined 9th - 12th Report, 72d Session, CERD/C/DOM/CO/12, at 2 (Feb. 28-29, 2008) [hereinafter CERD Report]; see also Ryszard, *supra* note 65, at 327 (explaining additional human rights violations suffered by ethnic Haitian residents in the Dominican Republic. Particularly during deportation, families are often separated, even if that means children are left alone. The deportees also suffer from verbal abuse and physical violence. Various human rights organizations divulge a condition of "violence, extrajudicial killings, and illegality perpetrated by the Dominican armed forces" as a means of deportation.).

<sup>82</sup> See CERD Report, *supra* note 81, at 6.

<sup>83</sup> Ryszard, *supra* note 65, at 311.

<sup>84</sup> See *id.*

<sup>85</sup> *Id.* at 311-12.

<sup>86</sup> *Id.* at 312.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> A LIFE IN TRANSIT, *supra* note 76, at 10-15.

continue to be denied documentation. Among the human rights issues, the right to nationality is a cornerstone.<sup>90</sup> Critics argue that contrary to the practice of other countries, the Dominican Republic grants no documentation – neither citizenship nor a permanent residence – to some residents who have been living in their territory for generations.<sup>91</sup> Lacking any form of documentation, the vast majority of these Dominico-Haitians live in a state of “permanent illegality.”<sup>92</sup>

*B. The Dominican Republic’s Commitment to International Law Imported into its National Law on Education and Nondiscrimination*

The Dominican Republic has ratified both the ICESCR and the CRC.<sup>93</sup> Thus, this nation has accepted its international legal obligation to engage in the progressive realization of free compulsory primary education for all school-aged children, as well as to provide secondary and higher education to the extent of its capability.<sup>94</sup> By ratifying these treaties, the Dominican Republic has also committed to the principle of nondiscrimination.<sup>95</sup> The CESCR interprets this commitment as accessibility of education “to all persons of school age residing in the territory of a State party, including non-nationals, and irrespective of their legal status.”<sup>96</sup> Nonetheless, the Dominican government has

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<sup>90</sup> See e.g., *id.* at 17.

<sup>91</sup> Ryszard, *supra* note 65, at 333.

<sup>92</sup> See *id.*

<sup>93</sup> Office of the United Nations High Commissioner for Human Rights, *Status of ratification: International Covenant on Social, Economic, and Cultural Rights*, Status as at: Jan. 21, 2012, available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en). The Dominican Republic’s ratification of these treaties also recognizes its commitment to other recognized human rights; yet for the purposes of clarity and precision of this paper, discussion will primarily be limited to the right to education.

<sup>94</sup> See ICESCR, *supra* note 21, at art. 13; CRC, *supra* note 22, at art. 28.

<sup>95</sup> See ICESCR, *supra* note 21, at art. 2(2); CRC, *supra* note 22, at art. 2.

<sup>96</sup> See CESCR General Comment No. 13, *supra* note 4, ¶ 34; see also A LIFE IN TRANSIT, *supra* note 76, at 7-8 n.7 (discussing the reiteration of the principle of non-discrimination in multiple agreements to which the Dominican Republic is a party, including: “The Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol; the International Convention on the Elimination of All Forms of Racial Discrimination; and the Convention on the Rights of the Child. Furthermore, within the Inter-American system, it has ratified the American Convention on Human Rights (“Pact of San José”) and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (“Convention Belém do Pará”).

provided Dominico-Haitian children different access to education than it has provided other Dominican children, under the guise of sovereignty in migration laws and policies.

In light of Article 4 of the CRC, which mandates “undertak[ing] all appropriate legislative, administrative, and other measures, for the implementation of the rights recognized in the [CRC],”<sup>97</sup> the Dominican Republic passed its Code of the Minor in January 1997.<sup>98</sup> The Code was deliberately aimed at “adequately implementing the [CRC], compiling and systematizing the main laws on minors in the Dominican Republic.”<sup>99</sup> That same year, the Dominican government also passed Law No. 66-97, the Organic Education Law, which provided the framework of the educational system, and mandated nondiscrimination by national law.<sup>100</sup> The Organic Education Law explicitly established the right to education as a right to be enjoyed “without any form of discrimination due to race, sex, creed, economic and social position, or any other reason.”<sup>101</sup> Further, this national law imposed on the state the positive duty to promote policies and otherwise support the development of educational life through social, economic and cultural programs that are particularly aimed at helping families overcome socio-economic barriers.<sup>102</sup>

The 2002 Constitution of the Dominican Republic guaranteed the right to education and prescribed compulsory primary education to all, further securing its international legal obligations by virtue of the national constitution.<sup>103</sup> Article 8 incorporated the principle of nondiscrimination, stating that “[i]t is the duty of the State to provide

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<sup>97</sup> CRC, *supra* note 22, at art. 4.

<sup>98</sup> Inter-American Comm’n on Human Rights, Org. of American States, Report on the Situation of Human Rights in Dominican Republic, OEA/Ser.L/V/II.104, Doc. 49 rev. 1, ¶ 69 (Oct. 7, 1999) [hereinafter Report on the Situation of Human Rights in DR].

<sup>99</sup> *Id.* ¶ 411.

<sup>100</sup> Robert F. Kennedy Center for Justice and Human Rights, Right to Education of Afro-descendants and Indigenous People in the Americas, Report prepared for a thematic hearing before the Inter-American Commission on Human Rights, 115 (2008) [hereinafter Robert F. Kennedy Center for Justice and Human Rights], *available* at [http://www.law.virginia.edu/pdf/news/hrclinic\\_report.pdf](http://www.law.virginia.edu/pdf/news/hrclinic_report.pdf).

<sup>101</sup> *Id.* at 115 n.33 (citing the statutory text of article 4(2) of the Organic Education Law) (translated from Spanish) (emphasis added). Ley General de Educación, Ley No. 66-97 (Apr. 15, 1997) (Dom. Rep.).

<sup>102</sup> Robert F. Kennedy Center for Justice and Human Rights, *supra* note 100, at 115-16.

<sup>103</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA [CONSTITUTION] July 25, 2002, art. 8(16) (Dom. Rep.).

fundamental education to all inhabitants of the national territory and take necessary measures to eliminate illiteracy.”<sup>104</sup> The 2002 Constitution used even stronger language than the ICESCR and the CRC, providing that all levels of education shall be free to all, including primary and secondary, as well as other forms of education such as agricultural, vocational, commercial, manual arts, and domestic economics.<sup>105</sup> Furthermore, unlike the international treaties, the 2002 Constitution did not allow compliance by progressive realization, but rather established an immediate obligation of free education to all inhabitants of the national territory.<sup>106</sup>

In 2003, national legislation more specifically addressed the right to education of undocumented migrants. The Code for the Protection of the Fundamental Rights of Children and Adolescents established the Principle of Equality and Nondiscrimination regardless of any condition of the child or his or her parents.<sup>107</sup> Article 45 of this law repeated the protection of the right to free and compulsory education, but more notably, paragraph 2 stated that “[u]nder no circumstances can children or adolescents be denied education for reasons such as . . . lack of documents proving identity or economic resources . . .”<sup>108</sup> Thus, according to the de jure nondiscrimination policy of the Dominican Republic, undocumented children of migrant parents were guaranteed their right to education without discrimination based on their undocumented legal status.<sup>109</sup>

C. *The Dominican Civil Registry’s Discriminatory Practices against Ethnic Haitians*

While international treaties and national law told one story, the contemporaneous discriminatory practices against the Dominico-Haitian population told another. Since 1982, the Central Electoral Board (Junta Central Electoral or “JCE”) was the state registry agency responsible for issuing various forms of documentation, including birth certificates, cédulas (identity cards), and passports.<sup>110</sup> New parents solicited birth

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<sup>104</sup> *Id.* (emphasis added).

<sup>105</sup> *Id.*

<sup>106</sup> *See id.*

<sup>107</sup> Código para el Sistema de Protección y los Derechos Fundamentales de Niños, Niñas y Adolescentes, Ley No. 136-03 (Oct. 17, 2003) (Dom. Rep.).

<sup>108</sup> *Id.* at art. 45, ¶ II (translated from Spanish).

<sup>109</sup> *See id.*

<sup>110</sup> Open Society Foundations, Dominicans of Haitian Descent and the Compromised Right to Nationality, Report Presented to the Inter-American Commission on Human Rights on the Occasion of its 140th Session 3, at 3 n.6 (2010) [hereinafter 2010 Report Presented to IACHR], *available at*

certificates for their children at one of the 161 JCE civil registry offices by providing proof of their own identification, as well as proof of their child's birth.<sup>111</sup> Parents usually proved their child's birth in one of two ways: for hospital births, the hospital personnel provided documents called *constancias de nacimiento*, and for home births, parents presented sworn testimony of a witness to the child's birth.<sup>112</sup> When the JCE office was satisfied with both the parents' documents and the child's proof of birth, the state would grant the new child a birth certificate.<sup>113</sup> The Dominican birth certificate, the first form of identification for a Dominican national, was the primary form of identification until the child reached eighteen years of age.<sup>114</sup>

i. The Hospital's and Registry's Flagrant Denial of Documentation to Dominico-Haitian Newborns

Dominico-Haitian newborns faced several barriers to obtaining birth certificates. First, Dominican hospitals routinely denied *constancias de documentos* for ethnic Haitian children born in their facilities, and they were even more likely to deny this proof of birth if the parents lacked documentation.<sup>115</sup> Even with all the necessary documentation in possession, the parents were often unable to register their children because of fees demanded by the JCE registry offices.<sup>116</sup>

Additionally, the parents met resistance through the increasingly discriminatory practices of the civil registry offices.<sup>117</sup> Different offices imposed inconsistent evidentiary requirements for obtaining a birth certificate. By the year 2000, even parents with valid forms of identification, such as foreign registry cards or even valid *cédulas*, were prevented from registering their children on the basis that they were ethnically Haitian.<sup>118</sup> Some offices maintained a clear policy that they would not register anyone who "looked like a Haitian," thus rejecting all registrations by people who had a darker skin color, wore characteristically Haitian clothing, or spoke with a Haitian accent.<sup>119</sup>

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[http://www.soros.org/initiatives/justice/articles\\_publications/publications/dominicans-haitian-descent-20101028/Dominican-Republic-Nationality-Report-ENG-20110805.pdf](http://www.soros.org/initiatives/justice/articles_publications/publications/dominicans-haitian-descent-20101028/Dominican-Republic-Nationality-Report-ENG-20110805.pdf). The JCE also oversees all elections for public office. *Id.*

<sup>111</sup> *Id.* at 3-4.

<sup>112</sup> *Id.* at 4 n.7.

<sup>113</sup> *Id.* at 4.

<sup>114</sup> *Id.*

<sup>115</sup> Ryszard, *supra* note 65, at 334.

<sup>116</sup> *Id.*

<sup>117</sup> 2010 Report Presented to IACHR, *supra* note 110, at 5.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

The different civil registry offices maintained wide discretion and practiced varying degrees of discrimination.<sup>120</sup>

ii. The Dominican Law Securing Nationality and Documentation for All Persons Born in the Territory Was Unenforced

The practice of the civil registry offices directly contradicted national law and the national Constitution. Since 1929, the Dominican Republic had granted Dominican nationality, and accompanying documentation, to all children born in its territory.<sup>121</sup> Article 11 of the 1999 Constitution, preserved in the 2002 Constitution and in effect until 2010, guarded this right of nationality for “[a]ll persons born in the territory of the Republic with the exception of the legitimate children of foreigners resident in the country in diplomatic representation or in transit.”<sup>122</sup> Other legislation enacted around the same time period as this Constitution interpreted the same “in transit” language of the Article 11 exception to wield a temporal scope of less than ten days.<sup>123</sup> This meant that the Article 11 “in transit” exception traditionally only applied to children born in the Dominican Republic to foreigners or migrants who remained in the Dominican territory for less than ten days.<sup>124</sup> Therefore, the practices of the JCE civil registry offices, which used documentation and proof of birth requirements to routinely deny birth certificates to Dominican-born children of Haitian descent, were inconsistent with the existing constitutional right to nationality.<sup>125</sup> Furthermore, Article 11 provided no legal basis for refusing to grant

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.* (detailing the history of the legislative intent and statutory interpretation of the “in transit” language, which steadily maintained a temporal scope of less than ten days).

<sup>122</sup> *Id.* (quoting Article 11 of the 1999 Constitution of the Dominican Republic). The same language of the text is preserved in the 2002 Constitution. CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA [CONSTITUTION] July 25, 2002, art. 11 (Dom. Rep.).

<sup>123</sup> See 2010 Report Presented to IACHR, *supra* note 110, at 3 n.4 (detailing two 1939 immigration laws which served as governing migration laws until August 2004. These two laws defined foreigners “in transit” as those “who entered the Dominican Republic with the principle objectives of traveling to another destination, those engaging in business or leisure activities, and diplomats.”); see also U.N. Human Rights Comm., Follow-up State Reporting: Action by State Party: Dominican Republic, U.N. Doc. CCPR/CO/71/DOM/Add.1, ¶ 57 (2002) (indicating the Dominican Republic’s statements in reports made to U.N. bodies that “[a] period of 10 days will be considered ordinarily sufficient to pass through the Republic”).

<sup>124</sup> 2010 Report Presented to IACHR, *supra* note 110, at 3.

<sup>125</sup> See *id.* at 5.

nationality, whether for lack of documentation or for “look[ing] like a Haitian.”<sup>126</sup>

*iii. Dominico-Haitian Children’s Inability to Obtain Documentation Is the Unlawful Roadblock to Their Education*

The inability to obtain documentation had long-term implications both for individuals and for their children. The Dominican birth certificate is a necessary precedent for obtaining a *cédula*, the standard identity card.<sup>127</sup> Dominican law requires possession of a valid *cédula* upon reaching the age of 18.<sup>128</sup> In fact, those who were caught without a valid *cédula* are subject to fines, imprisonment and even deportation.<sup>129</sup> This combination of law and practice places Dominican-born, ethnically-Haitian individuals into a cycle of denied documentation. The Dominico-Haitians who were denied Dominican birth certificates grow to be adults incapable of obtaining *cédulas*, and they inevitably violate the national law requiring valid *cédula* possession. When these Dominico-Haitians have children, they lack the documentation necessary to obtain a Dominican birth certificate for their new child. Alternatively, they are denied documentation for their child simply for appearing Haitian. Either way, generations of Dominico-Haitians become stuck in a state of “permanent illegality.”<sup>130</sup>

For generations of Dominico-Haitian children, the denial of documentation has been the ultimate roadblock to accessing an education.<sup>131</sup> The practice of the civil registry offices uniquely denied documentation, including both the Dominican birth certificate and the *cédula*, to Dominico-Haitians. Although the Dominican government claimed this identification is not necessary to enroll in primary education,<sup>132</sup> all children must possess valid *cédulas* in order to enroll in secondary schools.<sup>133</sup> Therefore the practices of the civil registry created *de facto* discrimination against Dominico-Haitian children’s access to education, at least at the secondary level. These

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<sup>126</sup> *See id.*

<sup>127</sup> *Id.* at 4.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 4 n.9 (discussing Personal Identification laws which made it mandatory to possess, use, and carry around a *cédula* and noting that the same law provided a mandatory prison term for being caught without the *cédula*).

<sup>130</sup> *See Ryszard, supra* note 65, at 333.

<sup>131</sup> *See id.*

<sup>132</sup> *Id.* at 334 (relating the government’s statement according to the local news).

<sup>133</sup> *Id.*

discriminatory practices violated both an immediate treaty obligation,<sup>134</sup> and explicit national law prohibiting discrimination based on undocumented status.<sup>135</sup>

*D. Validating Discriminatory Practices by Codifying it in National Migration Law*

The discriminatory treatment of Dominico-Haitians was inconsistent with existing national law. Rather than stop the de facto discriminatory practices, the Dominican government codified it.<sup>136</sup> Therefore, it perpetuated the unlawful discrimination against Dominico-Haitian children regarding access to education. Despite widespread criticism, the Dominico-Haitian children's right to education remains unenforced.

*i. New Migration Law Contradicts 65 Years of Constitutional Interpretation to Deny Documentation to Dominico-Haitians*

In August 2004, the Dominican Congress passed a new immigration law, the General Migration Law (Ley General para las Migraciones, No. 285-04), which met opposition from human rights organizations.<sup>137</sup> The General Migration Law changed the immigration law that was in place since 1939: the Article 11 "in transit" exception no longer applied only to Dominican-born children of parents spending less than ten days in the territory. Rather, the exception now applied to all "nonresidents."<sup>138</sup> The new law defined "nonresident" broadly to include not only temporary migrant workers, but all persons with expired residency visas and all undocumented migrant workers.<sup>139</sup> The 2004 General Migration Law effectively denied citizenship to all Dominican-born children with parents of Haitian descent.<sup>140</sup> The new law thus codified the existing discriminatory practices of the JCE civil registry offices by drastically changing the longstanding interpretation of the Dominican

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<sup>134</sup> See ICESCR, *supra* note 21, at art. 2(2); see also CRC, *supra* note 22, at art. 2.

<sup>135</sup> See *supra* text accompanying notes 100-108.

<sup>136</sup> See 2010 Report Presented to IACHR, *supra* note 110, at 3.

<sup>137</sup> See A LIFE IN TRANSIT, *supra* note 76, at 17. Ley de Migración, Ley No. 285-04, capítulo III, sección III, art. 28 (Aug.15, 2004) (Dom. Rep.) [hereinafter 2004 General Migration Law].

<sup>138</sup> 2010 Report Presented to IACHR, *supra* note 110, at 7.

<sup>139</sup> *Id.*

<sup>140</sup> David C. Baluarte, Inter-American Justice comes to the Dominican Republic: An Island Shakes as Human Rights and Sovereignty Clash, 13 AM. U. HUM. RIGHTS BR. 25, 25 (Winter 2006) [hereinafter Baluarte] (discussing Ley de Migración No. 285-04, passed by the Dominican Congress and promulgated on Aug. 15, 2004).



Constitution.

The 2004 Migration Law also enforced these changes by promulgating a new birth certification system.<sup>141</sup> This system instructed Dominican hospitals not to grant “nonresident” mothers a standard, white-colored proof-of-birth document (*constancia de nacimiento*), but rather to grant a pink “certification of foreigner live birth” (*constancia de nacido vivo extranjero*) listing general information for a separate record of foreigners.<sup>142</sup> Unlike the official white-colored proof-of-birth document, a child could not use a pink document to obtain a Dominican birth certificate from the JCE civil registry, nor a *cédula*; and without that identity documentation, the Dominico-Haitian children often could not obtain government services or enroll in secondary schools.<sup>143</sup> Because *cédulas* are necessary to enroll in secondary schools, the 2004 General Migration Law and its pink certificates for Dominico-Haitian children codified the *de facto* discriminatory practices of the civil registry, thus becoming a *de jure* violation of international law. Furthermore, the 2004 General Migration Law was inconsistent with the national Constitution and with pre-existing legislation prohibiting discrimination against undocumented children in accessing education.

ii. Widespread Criticism of Discrimination, Yet Lack of Enforcement of International Law

Criticism of the 2004 General Migration Law was widespread from human rights organizations and activists to organs of the United Nations, and the reports of discrimination led to investigation.<sup>144</sup> The CESCR observed that the 2004 General Migration Law left large numbers of children “effectively stateless.”<sup>145</sup> The United Nations Special Rapporteur on Contemporary Forms of Racism and the United Nations Independent Expert on Minority Issues observed that the Migration Law was not consistent with Article 11 of their national constitution and thus jointly recommended that the Dominican Republic bring the Migration Law in line with Article 11.<sup>146</sup> A human rights organization characterized Dominico-Haitian children’s denial of

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<sup>141</sup> 2010 Report Presented to IACHR, *supra* note 110, at 7.

<sup>142</sup> 2004 General Migration Law, *supra* note 137, at art. 28.

<sup>143</sup> Human Rights Advocates, *supra* note 79, ¶ 5.

<sup>144</sup> A LIFE IN TRANSIT, *supra* note 76, at 17.

<sup>145</sup> Comm. on Econ., Soc. and Cultural Rights, Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant; Concluding Observations of the Committee on Economic, Social and Cultural Rights: Dominican Republic (54th sess.) Nov. 1 – 19, 2010, E/C.12/DOM/CO/3, ¶ 11 (Nov. 26, 2010).

<sup>146</sup> 2010 Report Presented to IACHR, *supra* note 110, at 8.

education as “hinder[ing them] for the rest of their lives” and “unreasonably perpetuat[ing] existing inequalities.<sup>147</sup> Yet, the criticism led to no enforcement of the Dominican government’s treaty obligations under the ICESCR or CRC, which provided no mechanisms of enforcement.

Under the frameworks of both the 4-A scheme and minimum core obligations, discrimination at any level of education is a violation of the right to education. Nondiscrimination is an immediate treaty obligation, despite the fact that states may ensure other aspects of the right to education through progressive realization. Contradicting Article 11 of the 1999 Constitution, the 2004 General Migration Law denies nationality to Dominico-Haitian children.<sup>148</sup> Coupled, not incidentally, with the existing discriminatory practices of the JCE civil registry, these children can never obtain any proper documentation recognized by the Dominican government. Even if, as the Dominican government claims,<sup>149</sup> the pink certificate grants access to primary education, the General Migration Law results in clear discrimination against Dominico-Haitian children who cannot meet the prerequisite to enroll in secondary schools.<sup>150</sup> By denying nationality, by denying birth certificates, and by denying cédulas, the 2004 Migration Law constitutes a de jure violation of the Dominican Republic’s treaty obligations.

iii. Use of Discriminatory Migration Law as a Vehicle for Violating Right to Education

The Dominican Republic has sovereignty to establish immigration law and policy, yet it must comply with international human rights laws and standards.<sup>151</sup> The Dominican government may believe that the 2004 General Migration Law is necessary to prevent a huge increase in Haitian migration and unpredictable changes in voting patterns.<sup>152</sup> Accordingly, instead of granting long-term residency to Dominico-Haitians, the Dominican government responds that undocumented Dominico-Haitians should solicit help from the Haitian government.<sup>153</sup>

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<sup>147</sup> See HUMAN RIGHTS WATCH, “ILLEGAL PEOPLE”: HAITIANS AND DOMINICO-HAITIANS IN THE DOMINICAN REPUBLIC 28 (2002) (noting also the resulting inability to obtain nationality, employment, health care, and other civic rights).

<sup>148</sup> Baluarte, *supra* note 140, at 25.

<sup>149</sup> Ryszard, *supra* note 65, at 334.

<sup>150</sup> *Id.*

<sup>151</sup> A LIFE IN TRANSIT, *supra* note 76, at 8.

<sup>152</sup> Ryszard, *supra* note 65, at 335.

<sup>153</sup> *Id.* (noting that help from Haiti would come, if at all, in the form of Haitian documentation, which is of no use to Dominico-Haitian children attempting to enroll in schools in the Dominican Republic).

Exercising its sovereignty in migration law, the Dominican government “would welcome a significant low-wage labor presence in certain economic sectors, but would not welcome the social cost of a permanent community.”<sup>154</sup>

The government’s position would carry more weight if they sought merely to limit future entry. Yet the current General Migration Law discriminates against Dominico-Haitians who have resided in Dominican territory for multiple generations. Another inconsistency underlying the discriminatory law and policies is that ethnically-Haitian migrants “are accused of taking jobs away from Dominicans. Yet most Dominicans admit that Haitians do the work they choose not to do.”<sup>155</sup> It would be unjust for the Dominican Republic to use limited resources as a justification for discriminating against Dominico-Haitians,<sup>156</sup> while they simultaneously exploit Dominico-Haitians as a labor resource for undesirable jobs.

The CESCR called education an empowerment right, “the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities.”<sup>157</sup> The 2004 General Migration Law’s denial of nationality has become a vehicle for stripping that empowerment right of education from undocumented Dominico-Haitian children.

#### IV. THE DOMINICAN REPUBLIC DISREGARDS BINDING ORDERS OF REGIONAL LAW

Though the ICESCR and CRC lack an enforcement mechanism,<sup>158</sup> regional law presents an alternative. The Dominican Republic, a member of the Organization of American States (OAS), ratified the 1969 American Convention on Human Rights (ACHR) on April 19, 1978.<sup>159</sup> Furthermore, on February 19, 1999, the Dominican Republic accepted the jurisdiction of the Inter-American Court of Human Rights.<sup>160</sup> Thus unlike the ICESCR and CRC, the ACHR could be enforced by the Inter-American Court of Human Rights (Inter-American Court). In 2003, the Dominican Supreme Court recognized the jurisdiction of the Inter-American Court and declared all Inter-American Court judgments to be

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<sup>154</sup> *Id.* at 333.

<sup>155</sup> *Id.* at 325.

<sup>156</sup> See ICESCR, *supra* note 21, at art. 2(3).

<sup>157</sup> CESCR General Comment No. 13, *supra* note 4, ¶ 1.

<sup>158</sup> Ryszard, *supra* note 65, at 12.

<sup>159</sup> Report on the Situation of Human Rights in DR, *supra* note 98, ¶ 77.

<sup>160</sup> *Id.*

binding and of equal weight to the Dominican Constitution.<sup>161</sup>

A. *The Inter-American Court of Human Rights Orders an End to Discrimination*

In 2005, the Inter-American Court reached a landmark decision and entered judgment against the Dominican Republic for discrimination against the Dominico-Haitians.<sup>162</sup> Two young girls brought this case after they were denied Dominican birth certificates, despite the fact that their mothers were born in the country and possessed valid *cédulas*.<sup>163</sup> The Inter-American Court rejected the Dominican interpretation of the “in transit” constitutional exception that deprived Dominico-Haitian children to their rightful nationality.<sup>164</sup> The court rebuked the arbitrariness of the 2004 General Migration Law, noting that “to consider that a person is in transit, irrespective of the classification used, the State must respect a reasonable temporal limit and understand that a foreigner who develops connections in a State cannot be equated to a person in transit.”<sup>165</sup>

Prohibiting the transmission of a parent’s migratory status to his or her child,<sup>166</sup> the court declared that a state’s discretion in determining its criteria for nationality cannot be used to discriminate against a discrete group of people.<sup>167</sup> The Inter-American Court also reaffirmed the reach of human rights, stating that “the migratory status of a person can never be a justification for depriving him of the enjoyment and exercising of his human rights,” which includes the right to education.<sup>168</sup> For that reason, the court ordered the Dominican Republic to reform its birth registration system under the 2004 General Migration Law, and to issue birth certificates to all children born in its territory without discrimination.<sup>169</sup>

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<sup>161</sup> 2010 Report Presented to IACHR, *supra* note 110, at 9.

<sup>162</sup> *Dilcia Yean and Violeta Bosico v. Dominican Republic*, Inter-Am. Ct. H.R. (ser. C) No. 130, ¶ 260 (Sept. 8, 2005).

<sup>163</sup> 2010 Report Presented to IACHR, *supra* note 110, at 6.

<sup>164</sup> *Id.*

<sup>165</sup> *Dilcia Yean and Violeta Bosico*, No. 130 ¶ 157.

<sup>166</sup> *Id.* ¶ 156.

<sup>167</sup> *Id.* ¶ 141.

<sup>168</sup> A LIFE IN TRANSIT, *supra* note 76, at 9 (citing Juridical Condition and Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶ 134 (Sept. 17, 2003)).

<sup>169</sup> 2010 Report Presented to IACHR, *supra* note 110, at 7.

B. *The Dominican Government's Defiant Response to a Binding Decision of Regional Court*

i. Dominican Supreme Court Reinterprets Constitution to Conform to Unlawful Migration Law

The Dominican Republic defied the order of the Inter-American Court through its own judicial and legislative measures.<sup>170</sup> In August 2005, one month before the Inter-American Court decision, the Secretary of Education limited undocumented children's access to school by issuing an order allowing such children to attend school through fourth grade, rather than through eighth grade as previous administrations had explicitly allowed.<sup>171</sup> Even with formal guarantees until fourth grade, actual enrollment was decided by local and regional education administrators, who often expelled undocumented children or altogether denied their enrollment.<sup>172</sup> Thus, access even to primary education was unreliable, and access beyond that level was near impossible.<sup>173</sup> Thus, in spite of the case pending before the Inter-American Court, discrimination in education persisted at least at the secondary level and frequently even below that level.

In December 2005, a few months after the Inter-American Court's decision, the Supreme Court of Justice of the Dominican Republic held that the General Migration Law was constitutional.<sup>174</sup> Against the clear language of the Dominican Constitution that anyone born in the Dominican Republic is a citizen, the Court affirmed the 2004 General Migration Law's unlawfully broad interpretation of the "in transit" exception.<sup>175</sup> By interpreting the "in transit" exception to include all the Haitian workers, even those who entered the country legally, the Dominican Court constitutionalized discrimination against the marginalized Dominico-Haitian children.<sup>176</sup>

Going against the legislature's longstanding interpretation of "in transit" to have a temporal scope of ten days, as well as the order of the Inter-American Court, the Dominican Supreme Court based its decision on the legislature's constitutional power to interpret the Article 11 text

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<sup>170</sup> *Id.*

<sup>171</sup> Robert F. Kennedy Center for Justice and Human Rights, *supra* note 100, at 118.

<sup>172</sup> *Id.* at 118-19.

<sup>173</sup> *Id.*

<sup>174</sup> Baluarte, *supra* note 140, at 25 (describing as "deeply flawed" the decision of the Supreme Court of Justice of the Dominican Republic on the constitutional challenge to the General Migration Law No. 285-04).

<sup>175</sup> A LIFE IN TRANSIT, *supra* note 76, at 17.

<sup>176</sup> *See id.*

on nationality as it deemed appropriate.<sup>177</sup> Against clear instruction by the Inter-American Court prohibiting the inheritance of a parent's migrant status, the Dominican Court refused to put any temporal limitation on the scope of the "in transit" exception.<sup>178</sup> The Dominican Court therefore "contravened its own jurisprudence, which in 2003 had established that all judgments issued by the Inter-American Court of Human Rights were binding and of equal weight to the country's constitution."<sup>179</sup>

ii. Discrimination Continues and Worsens Through Retroactive Revocation of Documentation

Continuing its defiance of the Inter-American Court, the Dominican government not only refused to change its 2004 Migration Law, but began applying it retroactively via additional policies of the JCE civil registry.<sup>180</sup> In March 2007, the administrative chamber of the JCE passed Circular 017, which allowed the civil registry offices to revoke prior grants of *cédulas* if the offices suspected that *cédula*-possessors' parents used unofficial forms of identification.<sup>181</sup> The official policy was that the revocation would be in effect until the authorities sorted out the parents' migration status, but in practice the revocation was indefinite.<sup>182</sup> The revoked *cédulas* most often belonged to Dominico-Haitians.<sup>183</sup> Circular 017 applied the 2004 Migration Law retroactively against the Dominico-Haitian by confiscating documentation which was previously acknowledged as valid.<sup>184</sup>

Additionally, Circular 017 barred the JCE civil registry from giving certified copies of one's own birth certificate to anyone with "suspect" documentation.<sup>185</sup> Instead, the offices were instructed to forward the suspect documents to the JCE headquarters, which indefinitely revoked birth certificates and *cédulas*.<sup>186</sup> Again, the suspect documentation most often belonged to Dominico-Haitians, as JCE offices based their suspicion on "Haitian-sounding names."<sup>187</sup> Dominico-Haitians of all

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<sup>177</sup> 2010 Report Presented to IACHR, *supra* note 110, at 8.

<sup>178</sup> *Id.* at 9.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 11.

<sup>182</sup> *Id.*

<sup>183</sup> 2010 Report Presented to IACHR, *supra* note 110, at 11-12.

<sup>184</sup> *See id.* at 11.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 11-12; *see also id.* at 13-16 (detailing another similar JCE administrative order, Resolución 12-2007, which propagated similar types of

ages fell victim to this new revocation procedure, including school-aged children who needed a certified copy of their documents to register for school.<sup>188</sup>

iii. Dominican Laws and Practices Discriminate against Dominico-Haitian Children and Prevent Access to Education at Least at the Secondary Level

The Committee on the Elimination of Racial Discrimination (CERD) issued a report in 2008 expressing its concern regarding the ongoing discrimination against Dominico-Haitians.<sup>189</sup> What followed was another ineffective dialogue between the Dominican Republic and the international community.<sup>190</sup> Dominican delegates reported that “individual and social rights guaranteed by the Dominican Constitution were enjoyable by all regardless of one’s nationality, and added that discrimination was prohibited in domestic law.”<sup>191</sup> They denied the existence of any state policies that discriminated against the Haitians, and explained that discriminatory practices, if any, came from individuals.<sup>192</sup>

However, CERD reiterated concerns that Dominico-Haitian children were denied birth certificates, and that this later limited their access to school.<sup>193</sup> When the committee reminded the Dominican representatives of the order by the Inter-American Court condemning the nation’s discriminatory practices, the Dominican representatives responded that the Dominican Supreme Court evaluated and validated the constitutionality of the 2004 General Migration Law, including the revised “in transit” exception.<sup>194</sup> When the committee expressed concern with the birth certification system, which issued pink birth certificates to Dominico-Haitian children, the Dominican delegate responded that this was “an administrative measure, not meant to be racially discriminatory.”<sup>195</sup> The Dominican delegates explained their interest in ensuring the legitimacy of documentation, and reported that *cédula* theft was common.<sup>196</sup> Circular 017, they assured the committee,

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indefinite revocation of documentation disproportionately against Dominico-Haitians).

<sup>188</sup> 2010 Report Presented to IACHR, *supra* note 110, at 11-12.

<sup>189</sup> See CERD Report, *supra* note 81, at 4-5.

<sup>190</sup> See *id.*

<sup>191</sup> *Id.* at 3.

<sup>192</sup> *Id.* at 5.

<sup>193</sup> *Id.* at 6.

<sup>194</sup> *Id.*

<sup>195</sup> CERD Report, *supra* note 81, at 6-7.

<sup>196</sup> *Id.* at 7.

was necessary to properly verify identities and documentation.<sup>197</sup>

The committee then directly addressed the Dominico-Haitian children's limited access to education, referencing the disproportionate low enrollment of Dominico-Haitian children.<sup>198</sup> The Dominican representative denied the existence of restrictions for foreign children to access Dominican schools, and asserted that up to fourth grade, children could enroll in school even without documentation.<sup>199</sup> On the subject of higher education, without confirming equal access, the Dominican delegation reported only that the Dominican Republic awarded more than 2,000 scholarships to Haitians to cover the costs of transportation.<sup>200</sup> Overall, concerns about discrimination against Dominico-Haitians were met with repetitive assurances that the Dominican Republic did not discriminate against this group. The conference ended with mere encouragement to comply with the international commitment to nondiscrimination.<sup>201</sup>

Although the CERD was without authority to promulgate changes to stop discrimination against Dominico-Haitian children, the CERD discussion made clear that documentation procedures for school enrollment remain discriminatory at least beyond the fourth grade level. Discrimination at any level of education constitutes a violation of an immediate legal obligation. Therefore, discrimination against Dominico-Haitian children's access to education above the fourth grade level is a violation of international law. The Dominican state is obligated to bring its discriminatory national laws into compliance.

*C. Amending the Dominican Constitution to Consolidate the Discrimination*

The Dominican Republic adopted a new Constitution on January 26, 2010 that incorporated the 2004 General Migration Law's overly broad interpretation into a new "in transit" exception, reinforcing the marginalization of Dominico-Haitian children.<sup>202</sup> Article 18 of the 2010 Constitution identifies seven criteria which may grant the Dominican right to nationality, or citizenship: first, having Dominican mothers or fathers; second, enjoying Dominican nationality before the 2010 Constitution took effect; third, being born in the Dominican territory,

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<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 7-8.

<sup>201</sup> CERD Report, *supra* note 81, at 7-8.

<sup>202</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DOMINICANA [CONSTITUTION] Jan. 26, 2010, art. 18 (Dom. Rep.).



but with the new “in transit” exception; fourth, being born abroad to Dominican mothers or fathers and acquiring dual citizenship; fifth, marrying a Dominican spouse; sixth, being a direct descendent of Dominicans residing outside national borders; and seventh, completing the legal naturalization process.<sup>203</sup> The 2010 Constitution’s “in transit” exception denies nationality to “foreigners who find themselves in transit or reside illegally on Dominican territory. Foreigners shall be considered as being in transit as defined in Dominican laws[.]”<sup>204</sup> Article 18 of the 2010 Constitution uses the language of the 2004 General Migration Law making “illegal residence” and “in transit” synonymous.<sup>205</sup> Additionally, there is no temporal limitation to remove a resident from the “in transit” status. Anyone who lacks the documentation necessary to establish legal residence is considered “in transit,” and thus cannot claim nationality rights. The 2010 Constitution has “transform[ed] the previous policies from an impermissible, unlawful practice – retroactive application of the 2004 migration law – into a constitutional policy.”<sup>206</sup>

Furthermore, while Article 18(2) might appear to preserve nationality rights for any Dominico-Haitians who enjoyed those rights prior to 2010, it does exactly the opposite.<sup>207</sup> Dominico-Haitians did not “enjoy” national rights prior to the 2010 Constitution; they experienced retroactive revocation of their identity documents due to discriminatory national policies.<sup>208</sup> Article 18(2) preserves the Dominico-Haitians’ illegal status and constitutionally provides for denying proper identification to newborn Dominico-Haitians.<sup>209</sup> A study conducted in July 2010 demonstrated that approximately 90 percent of mothers of Haitian descent who gave birth after the 2010 Constitution took effect were unable to obtain documentation for their newborn children.<sup>210</sup> The Dominico-Haitian children continue to be deprived of birth certificates and continue to face difficulty attending primary school.<sup>211</sup> Further, because they cannot apply for a cédula without a birth certificate, they cannot enroll in secondary schools.<sup>212</sup> What began as a de facto treaty violation by the civil registry’s practice became a violation by national

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<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at art. 18(3) (translated from Spanish).

<sup>205</sup> 2010 Report Presented to IACHR, *supra* note 110, at 16-17.

<sup>206</sup> *Id.* at 17.

<sup>207</sup> *Id.*

<sup>208</sup> *See id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 18.

<sup>211</sup> *Id.*.

<sup>212</sup> *Id.*

legislation in 2004 and a violation by national constitutional law in 2010.

V. ANOTHER CHANCE FOR THE INTER-AMERICAN COURT TO ADDRESS THE DISCRIMINATION

The Inter-American Commission on Human Rights has another opportunity to review the existing discriminatory law and practices in the Dominican Republic against Dominico-Haitians.<sup>213</sup> Emildo Bueno Oguís was born in the Dominican Republic to parents of Haitian descent, yet he was able to obtain a cédula because, at the time of his birth, the “in transit” exception of the Constitution was not interpreted broadly.<sup>214</sup> However, in 2007, due to the JCE’s Circular 017, Bueno was denied a certified copy of his birth certificate despite having a valid cédula.<sup>215</sup> In *Bueno v. Dominican Republic*, Bueno contested the legality of the retroactive application of the 2004 General Migration Law.<sup>216</sup> Bueno filed a constitutional complaint in 2008, which was rejected.<sup>217</sup> He appealed to the Supreme Court and received a hearing, yet a decision is not expected for several years.<sup>218</sup> In 2010, he filed a petition to the Inter-American Commission on Human Rights.<sup>219</sup> His legal claims include unlawful discrimination, arbitrary deprivation of nationality, denial of judicial personality, and consequential violations.<sup>220</sup>

One of Bueno’s main legal claims is that the Dominican law violates Article 24 of the American Convention of Human Rights (American Convention).<sup>221</sup> Article 24 reads: “All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.”<sup>222</sup> Circular 017 is *prima facie* neutral, yet the civil registry implements it by racial discrimination against Dominico-

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<sup>213</sup> See Open Society Justice Initiative and CEJIL, Summary of Initial Petition in the Case of Emildo Bueno Oguis v. Dominican Republic (2010) [hereinafter *Bueno Petition Summary*], available at <http://www.soros.org/initiatives/justice/litigation/bueno/Petition%20Summary-20100601.pdf>.

<sup>214</sup> *Id.* ¶ 2-3.

<sup>215</sup> *Id.* ¶ 5.

<sup>216</sup> *Id.* ¶ 6.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* ¶ 12.

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* ¶ 13-28.

<sup>221</sup> *Id.*, ¶ 19-20.

<sup>222</sup> American Convention on Human Rights, “Pact of San Jose, Costa Rica,” Nov. 22, 1969, 1144 U.N.T.S. 143..

Haitians and denies the right to nationality in violation of Article 24.<sup>223</sup> Because the Dominican Republic ratified the American Convention on September 7, 1978 and accepted the jurisdiction of the Inter-American Court, international law at the regional level has another opportunity to address the discrimination against the Dominico-Haitians by the Dominican Republic.<sup>224</sup>

#### VI. AN ALTERNATIVE LEGAL CLAIM TO NATIONALITY: A CALL FOR A QUICKER REMEDY TO ENFORCE THE RIGHT TO EDUCATION FOR DOMINICO-HAITIAN CHILDREN

The Dominican Republic's submission to the jurisdiction of the Inter-American Court represents progress in the enforcement of human rights, yet this enforcement mechanism alone is insufficient to address the violation of the right to education. *Bueno v. Dominican Republic* relies on the principle of nondiscrimination as provided in the American Convention and as applied to the right to nationality. However, it is possible to achieve other gains in human rights for the Dominico-Haitian population, particularly children, without waiting for the nationality litigation to conclude. The principle of nondiscrimination is clear in the ICESCR, the CRC, and the American Convention. Because Dominico-Haitian children are disproportionately barred from enrolling in secondary schools, the right to education provides a strong and concrete legal argument to enforce the principle of nondiscrimination.

At the very least, the Dominican government might allow enrollment in secondary schools without requiring a *cédula* as a precondition. While the nationality litigation is pending, it would benefit the Dominico-Haitian children sooner if this alternative legal claim brought changes in enrollment policies and procedures. Isolating the right to education, rather than relying on the right to nationality, may provide a more efficient avenue to a better life for Dominico-Haitian children. Ensuring the Dominico-Haitian children's access to education would be a substantial human rights victory, one that does not require waiting for the Dominican Republic to correct its discriminatory civil registry practices, its national migration law, and its Constitution.

#### VII. CONCLUSION

Despite consistent recognition of the fundamental right to education in international law, discrimination persists in access to education. States struggle to comply with nondiscrimination while also trying to

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<sup>223</sup> *Bueno* Petition Summary, *supra* note 213, ¶ 20.

<sup>224</sup> *Id.*, ¶ 29.

control migration. Meanwhile, the children of undocumented adult migrants are the ones who suffer, denied access to a meaningful education based on their undocumented status. Addressing the global problem of illegal immigration while safeguarding the rights of undocumented migrants may require delicate balancing, but denying children's right to education can serve no lawful role in that balance.

The Dominican Republic's discriminatory domestic laws can be addressed through several legal claims. As evidenced by recent litigation, the legal claim of choice focuses on the right to nationality. However, despite the judgment of the Inter-American Court declaring the 2004 General Migration Law unlawful, discrimination persists. Discrimination even attained constitutional status in 2010. The Inter-American Court has another opportunity in *Bueno v. Dominican Republic* to address the discrimination in the Dominican Republic by assessing the lawfulness of the JCE civil registry's administrative policies. Yet even if the Inter-American Court finds another violation, given the Dominican government's prior defiance of the Inter-American Court, it remains to be seen whether that outcome will help Dominico-Haitian children's education rights.

The discriminatory practices surrounding documentation in the Dominican Republic present a conglomeration of legal issues. Rather than wait for further enforcement of nationality rights or novel recognition by the Dominican government of its unlawful practices, isolating the issue of education presents a targeted means for achieving real progress in human rights. The right to education provides an alternative and more concrete legal argument against Dominican discrimination. The 2004 General Migration Law, the revised "in transit" exception of the 2010 Constitution, and the JCE's Circular 017 violate international law because they result in de facto discrimination against Dominico-Haitian children regarding access to education.

This legal argument may not entirely defeat discriminatory Dominican law. The government could easily cure its violation of the right to education without addressing its violation of other rights. It could simply eliminate the *cédula* requirement for enrollment in secondary schools. Yet this narrow remedy would give Dominico-Haitian children equal access to education beyond the fourth grade. That access to education has vast implications. Education is "an empowerment right" and "an indispensable means of realizing other human rights."<sup>225</sup> A seemingly small change may transform a country's larger human rights context.

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<sup>225</sup> CESCR General Comment No. 13, *supra* note 4, at ¶ 1.