Revue québécoise de droit international
Quebec Journal of International Law
Revista quebequense de derecho internacional

THE RIGHT TO JURIDICAL PERSONALITY OF ARBITRARILY DETAINED AND UNIDENTIFIED MIGRANTS AFTER THE CASE OF THE GUAYUBÍN MASSACRE

Christopher Campbell-Duruflé

Special Issue, November 2013

Defending the Human Rights of Migrants in the Americas: The Nadège Dorzema et al v Dominican Republic Case

URI: https://id.erudit.org/iderudit/1068174ar
DOI: https://doi.org/10.7202/1068174ar

See table of contents

Publisher(s)

Société québécoise de droit international

ISSN

0828-9999 (print)
2561-6994 (digital)

Explore this journal

Cite this article

Campbell-Duruflé, C. (2013). THE RIGHT TO JURIDICAL PERSONALITY OF ARBITRARILY DETAINED AND UNIDENTIFIED MIGRANTS AFTER THE CASE OF THE GUAYUBÍN MASSACRE. *Revue québécoise de droit international / Quebec Journal of International Law / Revista quebequense de derecho internacional*, 429–447. https://doi.org/10.7202/1068174ar

Article abstract

In the *Case of Nadege Dorzema et al v Dominican Republic*, the Inter-American Court of Human Rights declined to make a finding of violation of Article 3 of the *American Convention on Human Rights*, the right to juridical personality. The author provides an analysis of this aspect of the judgment and argues that future cases of arbitrary detention of migrants, when these are not duly identified, provide strong bases for concluding in a violation of this right. The author shows that such circumstances correspond to the cases previously decided under article 3 of the *American Convention*, namely where the State puts individuals in a position where they are prevented from enjoying their civil rights, and were the State refuses to emit formal recognition of individuals or peoples. The author further shows how this conclusion is supported by the case law of the European Court of Human Rights regarding collective expulsions of migrants, because of this court's special emphasis on their right to be duly identified and to an individualised evaluation of their case. The author concludes that finding a violation of Article 3 of the *American Convention* in future similar cases is necessary to give full meaning to this treaty and full effect to its regional specificity.

THE RIGHT TO JURIDICAL PERSONALITY OF ARBITRARILY DETAINED AND UNIDENTIFIED MIGRANTS AFTER THE CASE OF THE GUAYUBÍN MASSACRE

Christopher Campbell-Duruflé [*]

> *After we arrived at the Santiago hospital, a nurse came to examine me. The soldiers told her that I had nothing, but she replied that I had been beaten. After my examination, I stayed from noon to five o'clock waiting. I received no treatment apart from that verification. They did not give me drugs or food. At no point during my detention did the soldiers ask for my name. I was not allowed to contact an attorney, the Haiti embassy or to seek any other kind of help.*
>
> *Mr. Joseph Desravine, survivor of the Guayubín Massacre of June 18, 2001.*[1]

In the *Case of Nadege Dorzema et al v Dominican Republic*, the Inter-American Court of Human Rights declined to make a finding of violation of Article 3 of the *American Convention on Human Rights*, the right to juridical personality. The author provides an analysis of this aspect of the judgment and argues that future cases of arbitrary detention of migrants, when these are not duly identified, provide strong bases for concluding in a violation of this right. The author shows that such circumstances correspond to the cases previously decided under article 3 of the *American Convention*, namely where the State puts individuals in a position where they are prevented from enjoying their civil rights, and were the State refuses to emit formal recognition of individuals or peoples. The author further shows how this conclusion is supported by the case law of the European Court of Human Rights regarding collective expulsions of migrants, because of this court's special emphasis on their right to be duly identified and to an individualised evaluation of their case. The author concludes that finding a violation of Article 3 of the *American Convention* in future similar cases is necessary to give full meaning to this treaty and full effect to its regional specificity.

En el *Caso Nadège Dorzema* y otros Vs. *República Dominicana*, la Corte Interamericana de Derechos Humanos afirmó la ausencia de violación del artículo 3 de la *Convención Americana sobre Derechos Humanos*, que establece el derecho a la personalidad jurídica. El autor ofrece un análisis de este aspecto de la sentencia y argumenta que futuros casos de detenciones arbitrarias de migrantes, cuando éstos no estén debidamente identificados, proporcionarían bases sólidas para alegar la violación del referido derecho. El autor demuestra que tales circunstancias se asemejan a las de casos anteriormente examinados bajo el articulo 3 de la *Convención Americana*, en los cuales el Estado colocó a individuos en una posición que les impidió ejercer sus derechos civiles, y donde el Estado se negó a reconocer formalmente a personas o

---

[*] Christopher Campbell-Duruflé is an attorney registered with the Bar of Quebec since 2010, holds a B.C.L./LL.B. from McGill University (2009), will graduate in January 2014 from the LL.M. Program in International Human Rights Law at the University of Notre Dame, and is currently Fellow at the Inter-American Commission on Human Rights. I disclose having acted as representative of the victims as member of UQAM's International Clinic for the Defense of Human Rights (CIDDHU) in the case of the Guayubín Massacre. I sincerely thank Professor Paolo G. Carozza, University of Notre Dame, for his helpful comments in the preparation of this article, as well as Professor Bernard Duhaime, Université du Québec à Montréal, for his generous mentorship, and the editors of the RQDI for all their assistance in the preparation of this volume.

[1] Affidavit prepared by Joseph Desravine on June 14, 2012 (merits file, tome II, folio 567), *Case of Nadege Dorzema et al* (*Dominican Republic*) (2012), Merits, Reparations and Costs, Inter-Am Ct HR (Ser C) No 251 [*Nadege Dorzema et al*] [Translated by author].

pueblos. Además, el autor señala que esta conclusión tiene respaldo en la jurisprudencia de la Corte Europea de Derechos Humanos relativa a expulsiones colectivas de migrantes, teniendo en cuenta el énfasis puesto por este tribunal en el derecho de estos individuos a ser debidamente identificados y a tener una evaluación específica de cada caso. El autor concluye que el reconocimiento de una violación del artículo 3 de la *Convención Americana* en futuros casos similares es necesario para dar pleno sentido a este tratado y permitir la total eficacia de su especificidad regional.

I. Introduction

On October 24th, 2012, the Inter-American Court of Human Rights (IA Court) rendered its judgment in the *Case of Nadege Dorzema et al v Dominican Republic*, also sadly known as the "*Guayubín Massacre*". In its judgment, the IA Court addressed the series of violations alleged by the Inter-American Commission on Human Rights (IACHR) and the victims' representatives and found the Dominican Republic internationally liable for numerous breaches of the *American Convention on Human Rights*[2] (*American Convention*). The IA Court declined to make a finding of violation of Article 3 of the *American Convention* in favor of the victims, the right to juridical personality. In this article, I argue that the IA Court's case law, viewed in light of recent developments of the European Court of Human Rights' case law (ECHR), provides sufficient basis to find a violation of the right to juridical personality in future similar cases of arbitrary detention of migrants, when these are not duly identified.

In Part II, I summarise the facts of the *Guayubín Massacre* case, with a special emphasis on the arbitrary detention of the victims, and I present the IA Court's brief analysis under Article 3 of the *American Convention*. In Part III, I review the IA Court's case law under Article 3, and argue that it is constructed around two lines of cases: those where the State puts individuals in a position where they are prevented from enjoying their civil rights, and those were the State refuses to emit formal recognition of individuals or peoples. In Part IV, I present cases of the ECHR regarding arbitrary detention and collective expulsions of migrants, with a special emphasis on those where they are not duly identified.

In Part V, I close by arguing that the IA Court's case law, especially in light of the ECHR's treatment of the issue, provides strong bases for finding that future cases of arbitrary detention of migrants violate the right to juridical personality, when these are not duly identified. I also briefly deal with the two main counter-arguments to this position. I propose that giving full meaning to the right to juridical personality under the *American Convention* in such cases would be consonant with the objective of affirming this treaty's regional specificity in its approach to global human rights concerns.

---

[2] *American Convention on Human Rights*, 22 November 1969, 1144 UNTS 123 (entry into force: July 18, 1978) [*American Convention*].

II. Juridical Personality in the case of the *Guayubín Massacre*

A. Summary of the Facts

On June 17th, 2000, a group of Haitian nationals crossed the border between Haiti and the Dominican Republic near the town of Ouanamithe. In the early hours of the following day, approximately 30 of them boarded in a truck driven by two Dominican nationals set for Santiago de los Caballeros. Along the way, the truck was taken in pursuit by vehicles of the Border Forces Operations Post. Dominican soldiers opened fire on the truck, wounding and killing some of its occupants. The truck eventually overturned. When the Border Forces Operations Post members arrived on the site of the accident, some of the migrants who were trying to escape were shot and killed by the soldiers. The record shows that six Haitian migrants and one of the Dominican drivers were killed, and at least 13 migrants were injured.[3]

The deceased and the injured were put in ambulances and driven to the José María Cabral and Baez Regional University Hospital, in Santiago de los Caballeros. The victims assert that they were not given proper medical treatment and the IA Court found that "their personal data was not recorded at the time of their admission or discharge from the hospital." Furthermore, "the six deceased Haitians were buried in a mass grave in Gurabo, Dominican Republic".[4]

Later on June 18th, other victims were taken to Dejabón and detained in a military barracks where men, women and a minor of age were not separated. According to some of the victims, "they were not formally placed under arrest, they were not informed that they had done something forbidden or illegal, and they were not allowed to contact a lawyer or the Haitian embassy or any other person".[5] The IA Court observed that the record only shows that 11 of the victims were officially arrested. They were required to pay money to their guards of extorted them, boarded on buses despite their injuries and collectively expulsed into Haiti at the Ouanaminthe border checkpoint.

On July 13th, 2000, a prosecutor presented an originating order before the Court Martial of First Instance, requiring the indictment of four soldiers for the intentional homicide of the seven identified deceased and the injury of six other unnamed persons. The IA Court observes that "[t]his originating order did not individualise the injured persons".[6] The Joint Court Martial Appeals Court of the Armed Forces and the National Police eventually acquitted all the soldiers indicted.[7]

---

3 *Nadege Dorzema et al*, *supra* note 1, at para 41-47.
4 *Ibid* at para 50-53.
5 *Ibid* at para 54-55.
6 *Ibid* at para 58.
7 *Ibid* at para 62.

B. Absence of Violation of the Right to Juridical Personality

The victims' representatives argued before the IA Court that "the Dominican State has absolutely failed to recognise their possibility of being entitled to fundamental rights and duties", thereby leading to a violation of the right to juridical personality. The representatives added that in various circumstances the Dominican State acted "without any formality. [The migrants] had no name, or even a number. For the Dominican authorities these victims should not have existed."[8] These alleged circumstances include 1) the pursuit and extrajudicial execution of the migrants, 2) their collective deportation without due process, 3) the burial of the deceased in a mass grave, 4) the refusal of the Dominican authorities to try those responsible before the ordinary criminal jurisdiction and 5) the ineffective investigation and acquittal of those responsible.[9]

The IA Court dismissed this argument succinctly. It observed that "the arguments relating to Article 3 of the Convention do not strictly correspond to the Court's case law in relation to the right to juridical personality, but rather to the analysis of Article 1(1) of this instrument."[10] In so doing, it referred in a footnote to its rulings in the following cases: *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, *Case of Bámaca Velásquez v Guatemala*, *Case of the Yean and Bosico Girls v Dominican Republic*, *Case of Ticona Estrada et al v Bolivia* and *Case of Anzualdo Castro v Peru*.[11] This strict interpretation and lack of explanation invites to further reflections and legal developments, such as those proposed in the present article.

III. Analysis of the IA Court's Case Law Under Article 3

The IA Court has expressed the object of protection of the right to juridical personality in two lines of cases. The first, regarding forced disappearances, affirms that the right to juridical personality protects the right to enjoy rights. When an individual is extrajudicially captured by the State and never to be seen again, which results in indeterminacy as to whether he or she is still alive, and horrible anguish for his or her families and friends, this person is incapable of exercising other rights or undertaking obligations.[12] The second line of cases concerns circumstances where the

---

8 *Ibid* at para 222.

9 *Nadege Dorzema et al* (Dominican Republic), *supra* note 1 at para 221.

10 *Ibid* at para 224-227.

11 *Case of the Sawhoyamaxa Indigenous Community* (*Paraguay*) (2006) Merits, reparations and costs, Inter-Am Ct HR (Ser C) No 146, at para 188 [*Sawhoyamaxa Indigenous Community*]; *Case of Bámaca Velásquez* (*Guatemala*) (2000), Merits, Inter-Am Ct HR (Ser C) No 70, at para 179 [*Bámaca Velásquez*]; *Case of the Yean and Bosico Girls* (*Dominican Republic*) (2005), Preliminary Objections, Merits, Reparations and Costs, Inter-Am Ct HR (Ser C) No 130, at para 179 [*Yean and Bosico Girls*]; *Case of Ticona Estrada et al* (*Bolivia*) (2008), Merits, reparations and costs, Inter-Am Ct HR (Ser C) No 191, at para 69 [*Ticona Estrada et al*], and *Case of Anzualdo Castro* (*Peru*) (2009), Preliminary objection, merits, reparations and costs, Inter-Am Ct HR (Ser C) No 202, at para 87 [*Anzualdo Castro*].

12 See generally *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, UN Doc A/61/488 (entry into force: 23 December 2010).

State denies individuals or groups recognition of their existence. By refusing to emit identity documents to someone, for example, this person is relegated to legal invisibility. Both set of circumstances are not unrelated, however, since denial of official recognition also has the consequence of generating incapacity to exercise rights or undertake obligations. In this Part, I present both approaches in greater detail.

Article 3 of the *American Convention* provides: "Every person has the right to recognition as a person before the law."[13] In early cases regarding forced disappearances, the IA Court observed that Article XVII of the *American Declaration of the Rights and Duties of Man* defined juridical personality as "the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights".[14] Consequently, in cases of forced disappearances, the IA Court concluded that no violation of Article 3 of the *American Convention* had been committed, on the basis of such a definition.[15] It deemed that an act, to constitute a violation of the *American Convention*, should amount to "an absolute disavowal of the possibility of being a holder of such rights and obligations".[16]

The IA Court eventually overturned this interpretation in the *Case of Anzualdo Castro v Peru*, considering that forced disappearances in fact result in such "absolute disavowal". A series of judgments has been rendered in this sense since.[17] Like in many cases, Mr. Kenneth Ney Anzualdo Castro was a young politically involved student, member of a university student federation, and was subjected to forced disappearance in 1993 by individuals who identified themselves as members of the police.[18] The IA Court considered that his forced disappearance violated Article 3 of the *American Convention*, because it precluded his exercise of any other guaranteed right:

> [I]n cases of forced disappearance of persons, the victim is placed in *a situation of legal uncertainty that prevents, impedes or eliminates the possibility of the individual to be entitled to or effectively exercise his or her rights in general*, in one of the most serious forms of non-compliance with the State's duties to respect and guarantee human rights.[19]

---

13 *American Convention*, *supra* note 2, art 3.

14 OAS, *American Declaration of the Rights and Duties of Man*, OAS res XXX (1948). For petitions declared inadmissible regarding Article XVII of the *American Declaration*, see *Kenneth Walker* (*United States*) (2003), Inter-Am Ct HR (Ser C) No 62 at para 550; and *Pedro Luis Medina* (*United States*) (2011), Inter-Am Ct HR (Ser C) No 115.

15 *Bámaca Velásquez*, *supra* note 11 at para 178-181. See also *Ticona Estrada et al*, *supra* note 11 at para 69; and *Case of La Cantuta* (*Peru*) (2006), Merits, Reparations and Costs Inter-Am Ct HR (Ser C) No 162 at para 121.

16 *Bámaca Velásquez*, *supra* note 11 at para 179.

17 See for example, *Case of Chitay Nech et al* (*Guatemala*)(2010), Preliminary Objections, Merits, Reparations, and Costs, Inter-Am Ct HR (Ser C) No 212 at para 103; *Case of Gelman* (*Uruguay*) (2011), Merits and Reparations, Inter-Am Ct HR (Ser C) No 221 at para 101; and *Case of Radilla-Pacheco* (*Mexico*) (2009), Preliminary Objections, Merits, Reparations, and Costs, Inter-Am Ct HR (Ser C) No 209 at para 157.

18 *Anzualdo Castro*, *supra* note 11 at para 33-34.

19 *Ibid* at para 101 [emphasis added].

The second line of cases of the IA Court regarding Article 3 of the *American Convention* involves the refusal by the State to emit formal recognition to individuals or peoples. In the *Case of the Yean and Bosico Girls v Dominican Republic*, the parents of both girls, Dominican nationals of Haitian descent, applied for late registration of their births with the Civil Status Registry Office. The authorities repeatedly rejected their requests on the grounds that they did not meet the applicable requirements. The IA Court found that this deprivation of nationality, in violation of the laws of the State, was discriminatory. It also added that this constituted a violation of Article 3 of the *American Convention* because the State created a situation of "legal limbo" according to which "even though the children existed and were inserted into a particular social context, their existence was not recognized juridically; in other words they did not have juridical personality."[20]

In the *Case of the Saramaka People v Suriname*, timber and gold were extracted from the ancestral lands of this tribal people without their free, prior and informed consultation or consent. Furthermore, Suriname did not recognise "the Saramaka people as a juridical entity capable of using and enjoying communal property as a tribal group" or "of seeking equal access to judicial protection against any alleged violation of their communal property rights".[21] The IA Court concluded that the community itself possessed a collective juridical personality, which had been violated by such lack of formal recognition. This flowed from the fact that no one could substitute herself or himself to defend the rights of the community as a whole before the State's institutions.

In the *Case of the Sawhoyamaxa Indigenous Community v Paraguay*, the ancestral lands of the victim community were sold and its members forced to displace themselves and live in conditions of extreme poverty alongside a highway. Among other violations, it was established that at least 18 individuals had never received birth or death certificates from the State, which effectively put them "in a legal limbo", since "their existence and identity were never legally recognized, that is to say, they did not have personality before the law."[22] The IA Court concluded in a violation of the *American Convention* and put particular emphasis on the vulnerability of the victims:

> The State has a duty to provide the means and legal conditions in general, so that the right to personality before the law may be exercised by its holders. Specially, *the State is bound to guarantee to those persons in situations of vulnerability, exclusion and discrimination, the legal and administrative conditions that may secure for them the exercise of such right*, pursuant to the principle of equality under the law.[23]

The foregoing allows concluding that the IA Court has built its case law regarding Article 3 of the *American Convention* around the right of individual and

---

20 *Yean and Bosico Girls*, *supra* note 11 at para 180.

21 *Case of the Saramaka People* (*Suriname*) (2007), Preliminary Objections, Merits, Reparations, and Costs, Inter-Am Ct HR (Ser C) No 172 at para 167.

22 *Sawhoyamaxa Indigenous Community*, *supra* note 11 at para 192.

23 *Ibid* at para 189 [emphasis added].

collective persons to a formal recognition of their existence by the State and the protection of the capacity to exercise rights and undertake obligations. In cases of forced disappearance, a violation flows from the fact of being held secretly by the State. In the case of Indigenous communities, a violation flows from the negation of their legal standing as a collective identity. In the case of individuals more generally, a violation flows from the refusal to emit birth certificates or other identity documents. Importantly, the States' obligation to safeguard this right must take into account the special vulnerability of the persons concerned. In the following Part, I review how the European case law has dealt with these same concepts, and in particular with the right of migrants to be recognised individually as persons in situations where they are not duly identified.

IV. Analysis of Migrant's Rights to be Recognised as Persons in the ECHR's Case Law

The *Convention for the Protection of Human Rights and Fundamental Freedoms* (*European Convention*),[24] like the *African Charter on Human and Peoples' Rights* (*African Charter*)[25], does not enshrine the right to juridical personality as such. While this poses a challenge to a comparative analysis of the treatment of arbitrarily detained and unidentified migrants, the ECHR's case law remains highly relevant to the present argument. In this Part, I identify judgments of the ECHR regarding the right to effective remedies under the *European Convention* (Article 13) and the prohibition on collective expulsions (Article 4 of *Protocol No 4 to the European Convention*),[26] which deal with situations similar to that of the *Guayubín Massacre*. These have highlighted the right of persons detained to be duly personally identified and to be the object of an individualised evaluation. Both notions are helpful to inform our understanding of the content of the right to juridical personality under Article 3 of the *American Convention*.

The Grand Chamber of the ECHR was called in 2012 to rule on a case of arbitrary arrest and refoulement of undocumented migrants very similar to that of the *Guayubín Massacre*. In the *Case of Hirsi Jamaa et al v Italy*, the applicants were a group of eleven Somali nationals and thirteen Eritrean nationals who were travelling from Libya with some 200 other migrants on board three vessels in the high seas of the Mediterranean Sea.[27] Some 35 nautical miles south of this island of Lampedusa, ships from the Italian Revenue Police and Coastguard intercepted them. The

---

24 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 222 (entry into force: 3 September 1953).

25 *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 UNTS 217, (entry into force October 21, 1986).

26 "Collective expulsion of aliens is prohibited." Council of Europe, *Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the first Protocol thereto, as amended by Protocol No 11*, 16 September 1963, Eur TS 46, art 4.

27 *Case of Hirsi Jamaa et al v Italy*, No 27765/09, (23 February 2012) ECHR [*Hirsi Jamaa et al*].

applicants were transferred onto the Italian ships and summarily returned to Libya, without being individually identified and much less subject to due process of law.

The applicants successfully claimed before the ECHR that, in so doing, Italy had infringed the prohibition on torture and inhuman or degrading treatment by exposing them to dangerous conditions in Libya, Eritrea or Somalia (Article 3), the prohibition of collective expulsion of non-nationals (Article 4 of *Protocol No 4*), and the right to effective remedies (Article 13). Because of its overlap with the recognition of juridical personality, I present the Grand Chamber's analysis of this last claim in greater detail.

Regarding the alleged violation of Article 13 of the *European Convention*, the applicants argued that "none of the requirements of the effectiveness of remedies provided for in the Court's case-law had been met by the Italian authorities",[28] since they were simply transferred onto Italian military ships and returned to Tripoli without being individually identified, informed of their destination, given an opportunity to request protection, or given access to an interpreter or a legal advisor.[29] As further evidence, they stressed that "[all] their personal effects, including documents confirming their identity, were confiscated by the military personnel."[30]

The State acknowledged that no particular remedies were available to the migrants, but claimed that this was justified in the context of a "rescue operation" unfolding on the high sea.[31] According to Italian officials, this operation was conducted in furtherance of bilateral agreements concluded with Libya regarding clandestine immigration. They added that such policy "discouraged criminal gangs involved in people smuggling and trafficking, helped save lives at sea and substantially reduced landings of irregular migrants along the Italian coast".[32]

The Grand Chamber recalled that, when a State Party decides to subject persons to refoulement to a country where their life or freedom would be at risk, the available remedies must have a "suspensive effect" on the procedures.[33] In so doing, it referred to Article 33 of the 1951 *Geneva Convention relating to the Status of Refugees*[34] and the accompanying comments of the United Nations High Commissioner For Refugees.[35] The Grand Chamber also referred to the *Case of M.S.S. v Belgium and Greece*, in which it has written that, "[in] order to be effective,

---

28 *Hirsi Jamaa et al*, *supra* note 27, at para 189.

29 *Ibid* at para 11.

30 *Ibid* at para 185.

31 *Ibid* at para 191.

32 *Ibid* at para 13. On the topic of the humanitarian discourse justifying Italian border policies, see Maurizio Albahari, "The Birth of a Border: Policing by Charity on the Italian Maritime Edge" in Jutta Lauth Bacas and William Kavanagh, eds, *Border Encounters: Proximity and Asymmetry at Europe's Frontiers*, Oxford and New York, Berghahn Books, 2013 (forthcoming).

33 *Hirsi Jamaa et al*, *supra* note 27 at para 200. See also *Case of Čonka v Belgium*, No 51564/99, (5 May 2002) ECHR, at para 81-83 [*Čonka v Belgium*], and *Case of Gebremedhin v France*, No 25389/05, (26 April 2007) ECHR, at para 66.

34 *Convention relating to the Status of Refugees*, 28 July 1951, 189 UNTS 150 (entry into force April 22, 1954).

35 *Hirsi Jamaa et al*, *supra* note 27, at para 22-23.

the remedy required by Article 13 must be available in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State."[36]

The ECHR concluded that Italy had violated Article 13 of the *European Convention*.[37] Of significance to this article, the Grand Chamber stressed, as part of its analysis, the fact that "the applicants had no access to a procedure to identify them and to assess their personal circumstances before they were returned to Libya", and even less to a remedy which could suspend the refoulement procedure.[38]

The importance of personal identification for the ECHR is also made clear by its case law regarding the prohibition of collective expulsions, because this provision implies by its very nature a right to an individual assessment. As I have indicated above, the prohibition on collective expulsions is established in Article 22(9) of the *American Convention* and Article 4 of *Protocol No 4 to the European Convention*. The *African Charter* also contains an explicit prohibition of collective expulsion. Article 12(4) specifies that a "non-national legally admitted […] may only be expelled from [a territory of a State Party] by virtue of a decision taken in accordance with the law", which implies an individual determination of each person's case. While this right is surprisingly limited to "legally admitted" persons, Article 12(5) prohibits "mass expulsion of non-nationals" in any circumstances.[39]

The ECHR addressed the issue of collective expulsions specifically in the *Case of Čonka v Belgium*. In this case, the Ghent police had sent a notice to a number of Roma families of Slovakian nationality, supposedly convoking them to a meeting regarding their asylum applications. At the police station, the applicants were served with an order of detention and removal from the country. On October 5th, 1999, a large group of Roma persons, including the applicants, were boarded onto a plane and returned Slovakia. The applicants were not even provided with boarding passes: seat numbers were attributed to them by writing directly on the skin of their hands.[40] Though dissenting votes were registered, the applicants successfully pleaded that Belgium had infringed upon their rights to liberty and security (Article 5), to the prohibition on collective expulsions (Article 4 of *Protocol No 4*) and to effective remedies (Article 13).

While, in the case of the applicants, an individualised order to leave the country had already been delivered, the ECHR found that their deportation effectively constituted a collective expulsion because of the circumstances in which it occurred. In reaching this conclusion, the majority of the ECHR took into consideration the facts that high government official had planned beforehand a "plan of collective

---

36 *Case of M.S.S. v Belgium and Greece* [GC], No 30696/09, (21 January 2011) ECHR, at para 290[*M.S.S v Belgium and Greece*]. Quoted in *Hirsi Jamaa et al*, *supra* note 27, at para 200.

37 *Hirsi Jamaa et al*, *supra* note 27 at para 207.

38 *Ibid* at para 202.

39 See *Union Inter Africaine des Droits de l'Homme, Fédération Internationale des Ligues des Droits de l'Homme and Others v Angola* (1997), African Commission on Human and Peoples' Rights, Comm No 159/96.

40 *Čonka v Belgium*, *supra* note 33, at para 22.

repatriation", that all those expelled were convoked on the same day to the same police station, that the arrest and deportation document distributed to all were identical, and that, as a result, they had no effective possibility to access legal counsel.[41] The ECHR's analysis relied on a finding that the decision and ensuing procedure leading to their expulsion did not allow "an real and differentiated evaluation of the individual situation of each of the persons concerned".[42] Impliedly, the ECHR concluded that a collective expulsion had been committed because the individual applicants were not recognised as such.

The ECHR confirmed these principles in the *Case of Sultani v France*.[43] An Afghan national had presented two asylum applications, alleging that he and his family were under threat in Afghanistan because of their ethnicity and ties to the former Najibullah regime. Both applications were denied and Mr. Mohammad Sultani faced an expulsion order. On December 20th, 2005, a "group flight" was organised by French authorities, meaning that a group of Afghan nationals were transferred to this country on board a chartered plane. The applicant was not part of this "group flight", because his case was still under appeal. After all his appeals were lost, he applied to the ECHR and alleged violations of his right not to be subject to torture or to inhuman or degrading treatment or punishment (Article 3) and of the prohibition on collective expulsions (Article 4 of *Protocol No 4*).

The ECHR rejected both claims. It recalled that, in the case of proceedings involving more than one person, Article 4 of *Protocol No 4* requires a "reasonable and objective evaluation of the particular situation of each of the foreigners within the group".[44] Reviewing the various decisions taken in the case of the applicant, the ECHR was satisfied that "the individual evaluation of the situation of the petitioner" had been sufficiently conducted to provide an individualised basis for his expulsion.[45] This case thus reaffirms, implicit to the prohibition on collective expulsions, the right of every person facing deportation to be recognised individually and to have his or her case considered as such.

The preceding line of cases shows that, under the *European Convention*, the right to effective remedies (Article 13) and the prohibition on collective expulsions (Article 4 of *Protocol No 4*) exercise the functional equivalent of the right to juridical personality in the *American Convention* (Article 3). This function is to mandate the recognition by States of each individual as such. In the *Case of Hirsi Jamaa et al v Italy*, the applicants were not asked their names and collectively expulsed. In the *Case of Čonka v Belgium*, the applicants were identified by their names, but collectively expulsed. In both cases, the ECHR concluded that this resulted in incapacity to exercise any legal remedies available and noted how this implied the denial of their existence as individuals.

---

41 *Ibid* at para 61-62.

42 *Čonka v Belgium*, *supra* note 33, at para 63 [Translated by author].

43 *Case of Sultani v France*, No 45223/05, (20 September 2007) ECHR.

44 *Ibid* at para 81 [Translated by author].

45 *Ibid* at para 83 [Translated by author]. See also *Case of Vedran Andric v Sweden*, No 45917/99, (23 February 1999) ECHR, (declared inadmissible for similar reasons).

This proximity between the right to juridical personality and the right to effective remedies is reinforced by the approach taken by the United Nations Human Rights Committee in its interpretation of Article 16 of the *International Covenant on Civil and Political Rights*, which also affirms: "Everyone shall have the right to recognition everywhere as a person before the law."[46] In the case of *Boudjemai v Algeria*, the Committee noted that its "established jurisprudence" affirmed that:

> [T]he intentional removal of a person from the protection of the law for a prolonged period of time may constitute a refusal to recognize that person as a person before the law if the victim was in the hands of the State authorities when last seen and if the efforts of his or her relatives to obtain access to potentially effective remedies, including judicial remedies (Covenant, art. 2, para. 3) have been systematically impeded.[47]

In the next part, I look at how the principles developed by the ECHR could inform the interpretation of Article 3 of the *American Convention* in future cases of improper identification of arbitrarily detained migrants.

V. The Right to Juridical Personality in Future Cases of Unidentified Arbitrarily Detained Migrants

In this final Part, I argue that there were strong bases for the IA Court to find a violation of the right to juridical personality in the *Guayubín Massacre* case, and that it would be consistent with a pro persona interpretation of the *American Convention* to arrive at this result in future cases of improper identification of arbitrarily detained migrants. In so doing, I focus on both identified dimensions of the right to juridical personality, namely the absence of recognition of individuals as such and the incapacity to enjoy rights and undertake obligations. I also show how the ECHR's case law can be of use to this analysis, despite the absence of a formal right to juridical personality in the *European Convention*.

Finally, I raise two counter-arguments to the position adopted and respond to them. The first is that the denial of a capacity to exercise rights in circumstances such as that of the *Guayubín Massacre* or the *Case of Hirsi Jamaa et al v Italy* are temporary, rather than permanent. The second is that the denial of improperly identified and arbitrarily detained migrants' rights is aptly redressed by a finding of violation of the right to due process and judicial guarantees, under Article 8 of the *American Convention*. I ultimately show how both arguments do not justify maintaining a strict interpretation of Article 3 of the *American Convention* in the future.

---

46 *International Covenant on Civil and Political Rights*, December 16, 1966, 999 UNTS 171 (entry into force: 23 March 1976) [*ICCPR*].

47 Human Rights Committee, *Boudjemai v Algeria*, Communication No 1791/2008, UNHRCOR, 2013, UN Doc CCPR/C/107/D/1791/2008, at para 8.9.

A. Recognition as an Individual

As showed in the testimony quoted in the header of this article, the *Guayubín Massacre* victims were not even asked for their names when detained. This omission was repeated at the José María Cabral and Baez Regional University Hospital, where there presence was not recorded. This mirrors closely one of the lines of cases identified by the IA Court as corresponding to violations of Article 3, namely that of denial of official identity documents or collective legal standing. The facts that the victims were detained without being arrested or even asked their names put them, in the eye of the Dominican State, in exactly the same situation as the girls Yean and Bosico, the Saramaka tribal community or some of the members of the Sawhoyamaxa Indigenous community who were deprived of birth certificates. Like in the *Case of Hirsi Jamaa et al v Italy*, their dignity as persons was trespassed because their very existence was denied.

Moreover, the victims were collectively and extrajudicially expulsed from the territory of the Dominican Republic without any individualised decision being made regarding their status. The United Nations Human Rights Committee has highlighted that Article 13 of the *International Covenant on Civil and Political Rights*, which restricts expulsions of aliens to situations regulated by law,[48] includes an implicit prohibition on collective expulsions:

> [B]y allowing only those [expulsions] carried out "in pursuance of a decision reached in accordance with law", [the Covenant's] purpose is clearly to prevent arbitrary expulsions. On the other hand, *it entitles each alien to a decision in his own case and, hence, article 13 would not be satisfied with laws or decisions providing for collective or mass expulsions*. This understanding, in the opinion of the Committee, is confirmed by further provisions concerning the right to submit reasons against expulsion and to have the decision reviewed by and to be represented before the competent authority or someone designated by it. An alien must be given full facilities for pursuing his remedy against expulsion so that this right will in all the circumstances of his case be an effective one.[49]

On the contrary, during the entire duration of their detention by the agents of the Dominican Republic and throughout the expulsion process, the survivors of the *Guayubín Massacre* were maintained in a "legal limbo" akin to the situation of the victims in the *Case of the Sawhoyamaxa Indigenous Community v Paraguay*.

---

[48] Article 13 reads: "An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority." *ICCPR*, *supra* note 46, art 13.

[49] Human Rights Committee, *CCPR General Comment No 15: The Position of Aliens Under the Covenant*, UNHRCOR, 27th Sess, (1986), online: OHCHR <http://www2.ohchr.org/english/bodies/hrc/comments.htm> [emphasis added].

The ECHR, in both the *Case of Čonka v Belgium* and the *Case of Hirsi Jamaa et al v Italy*, was clear to the effect that collective expulsions are incompatible with the recognition of individuals' right to an assessment of their own situation. The IA Court quoted these two cases in its judgment in the *Guayubín Massacre* case and adopted the following description of the act of collective expulsion: "a decision that does not make an objective analysis of the individual circumstances of each alien".[50] The fact that the individual circumstances of the victims were not considered should constitute a strong indicium that they were not recognised as persons.

Two final elements of the record underscore the extent to which the victims were kept in a situation of legal invisibility. Firstly, the deceased Haitian victims were buried in a mass grave in Gurabo.[51] Along with the lack of respect for their human dignity inherent to this action, this prevents their families and friends to know exactly where their remains are and creates a feeling of indeterminacy and anguish analogous to what is felt by the relatives of a victim of forced disappearance. Secondly, the originating order presented before the Court Martial of First Instance to indict those responsible did not name the victims whom it alleged had been injured by those accused.[52] This not only constitutes further evidence of the fact that the names of the victims were not adequately recorded after the massacre and that no proper investigation was conducted, but also increased the situation of legal invisibility of the victims and prevented the surviving ones to take part in the criminal proceedings.

This succession of facts shows that the victims of the *Guayubín Massacre* were not recognised as persons. Much like the members of the Sawhoyamaxa Indigenous community, they were in a state of "vulnerability, exclusion and discrimination": they were injured, doubly discriminated against because of their Haitian origin and their status as migrants, and deprived of liberty. The situation of improperly identified and arbitrarily detained migrants does not match precisely the facts of previous cases favorably decided by the IA Court under Article 3 of the *American Conventions* regarding denial of identification documents or legal standing. However, the elements identified allow concluding that it corresponds conceptually to such situation. During their detention and afterwards, the Dominican State refused to recognise juridically the "existence" of the migrants as individual persons, thereby putting them in a situation of "legal limbo". This demands treating future cases of improper identification of arbitrarily detained migrants as violations of the right to juridical personality, over and above a finding of violation of the right to due process and judicial guarantees under Article 8 of the *American Convention*.

---

50 *Case of Nadege Dorzema et al*, *supra* note 1, at para 171.
51 *Ibid* at para 52.
52 *Ibid* at para 58.

B. Capacity to Enjoy Rights

The *Guayubín Massacre* case also corresponds closely to the IA Court's line of cases developed under Article 3 of the *American Convention* on the basis of the victims' incapacity to enjoy rights and undertake obligations. Although the period during which they were in the custody of Dominican security forces lasted less than 24 hours, the victims' treatment shares all the attributes of situations of forced disappearance. Like in the *Case of Anzualdo Castro v Peru*, the victims were placed "in a situation of legal uncertainty that prevents, impedes or eliminates the possibility of the individual to be entitled to or effectively exercise his or her rights in general"[53] for at least three reasons.

Firstly, the victims were detained without being formally put under arrest, which prevented them from exercising such fundamental rights as challenging the legality of their detention (for example through a writ of *habeas corpus* or an *amparo* action) or requesting consular assistance.[54] Secondly, the victims did not challenge the poor quality of the medical services received, the fact that they were subject to extortion by the State agents, who asked them for money if they wanted to be transported in bus away from detention, or the fact that men, women and the minor of age were not separated. Surely, they would have done so if they had the capacity to exercise their rights. Thirdly, the victims did not oppose the decision to deport them in an arbitrary and collective way, in violation of all international standards regarding refugees. All this shows that, exactly like in the *Case of Čonka v Belgium*, none of the victims exercised their rights because it was made very clear them that they did not have the slightest one.

All the foregoing suggest that the arbitrary detention of unidentified migrants meets the second fundamental characteristic established by the IA Court in its case law, namely that it results in an incapacity to enjoy rights or undertake obligations. Indeed, the United Nations Special Rapporteur on the Human Rights of Migrants has highlighted in his 2012 report that migrants face a very high risk of being detained in prolonged and indefinite circumstances, in violation of their due process rights:

> The Special Rapporteur has noted that States use a wide range of reasons to justify the detention of migrants and some States see irregular migration as a national security problem or a criminal issue, and neglect the human rights issues at stake. […] Security detention poses particular risks to migrants, who may end up in prolonged or even indefinite detention justified by vague criteria. The Special Rapporteur would like to stress that *detention for security purposes may only be imposed after conducting an individual assessment in each case, for the shortest time possible, and in compliance with all procedural safeguards*.[55]

---

53 *Anzualdo Castro*, *supra* note 11 at para 101.

54 See *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law* (1999), Advisory Opinion OC-16/99, Inter-Am Ct HR (Ser A) No 16.

55 Human Rights Council, *Report of the Special Rapporteur on the Human Rights of Migrants*, UNHCROR, 2012, UN Doc A/HRC/20/24 [emphasis added] [*Report of the Special Rapporteur on the Human Rights of Migrant*s]. See also the Special Rapporteur's contribution to the present volume.

Understanding the right to legal personality as the right to "a place in the world" makes even more salient the fact that, albeit limited, the arbitrary detention of improperly identified migrants should be understood as a violation of Article 3 of the *American Convention* in the future. As Arendt has powerfully written regarding stateless persons, depriving individuals of their capacity to exercise right deprives them "of a place in the world which makes opinions significant and actions effective".[56] "[T]he greater the extension of arbitrary rule by police decree, she warns, the more difficult it is for states to resist the temptation to deprive all citizens of legal status and rule them with an omnipotent police."[57]

C. Counter-Arguments

Two counter-arguments that could be opposed to the position adopted in this article are that 1) the situation of arbitrarily detained and unidentified migrants does not amount to "an absolute disavowal" of their capacity to exercise rights, because it is often only temporary, and that 2) such cases are sufficiently dealt with as violations of the right to due process and judicial guarantees under Article 8 of the *American Convention*. Overarching is a concern as to whether, in the context of an increasing migratory phenomenon, Article 3 of the *American Convention* should be interpreted "strictly", as the IA Court did,[58] or more liberally.

It must be conceded that the situation of arbitrarily detained and unidentified migrants is not always as dire as that of victims of forced disappearance. While they are deprived of their legal existence, their ill fate is not necessarily "absolute" in the sense that they will hopefully be freed one day. In this sense, it can be rightfully argued that the situation of the migrants in the *Guayubín Massacre* case or in the *Case of Hirsi Jamaa et al v Italy* does not correspond to prior cases decided by the IA Court under Article 3 of the *American Convention*.

In response, I suggest that the question of temporality is inappropriate to evaluate whether a violation of the right to juridical personality is "absolute" or not. Not all forced disappearances are perpetual and some detentions of migrants may be more prolonged than that of the *Guayubín Massacre* case. The examples of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) camps in Jordan, Lebanon, the Gaza Strip, the Syrian Arab Republic, and the West Bank,[59] and the Office of the United Nations High Commissioner for Refugees (UNHCR) camps in Kenya[60] are painful reminders that the status of migrant may easily transform from temporary to almost permanent. The United Nations Special Rapporteur on the Human Rights of Migrants in fact highlighted his preoccupation

---

56 Hannah Arendt, "The Decline of the Nation-State and the End of the Rights of Man", in *The Origins of Totalitarianism*, New York, Schocken Books, 1951, p 293.

57 Arendt, *supra* note 56 at 287.

58 *Nadege Dorzema et al*, *supra*, note 1 at para 227.

59 Operations have started in 1950, pursuant to General Assembly Resolution 302(IV) of 1949.

60 The Daddab camp complex, described as the world's biggest refugee camp, was established as early as 1991 to receive persons fleeing from Somalia.

regarding cases of indefinite detention of migrants, particular in the case of stateless persons:

> Security detention poses particular risks to migrants, *who may end up in prolonged or even indefinite detention justified by vague criteria*. The Special Rapporteur would like to stress that detention for security purposes may only be imposed after conducting an individual assessment in each case, for the shortest time possible, and in compliance with all procedural safeguards.[61]

Rather than duration, I argue that the defining element for finding an "absolute" violation of the right to juridical personality should be whether there is effectively the impossibility for the unidentified migrant to exercise rights during the period of the arbitrary detention. The applicable criteria for the IA Court would thus be whether, based on the facts, the lack of identification of arbitrarily detained migrants amounts to an "absolute" denial of their existence as individuals and of their incapacity to exercise rights. This would give effect to the two criteria developed by the IA Court and echoed by the ECHR in the cases reviewed in this article. It would also avoid the somewhat absurd result of rejecting a claim because the violation was, so to speak, too short.

A second counter-argument is that cases of disavowal of the capacity to enjoy rights and undertake obligations can be sufficiently qualified as violations of the right to due process and judicial guarantees under Article 8 of the *American Convention* and that their analysis under Article 3 would be redundant. In the case of the *Guayubín Massacre*, the IA Court found that, like in the *Case of Hirsi Jamaa et al v Italy*, the lack of access to consular assistance, the absence of any expulsion decision taken in accordance with the law, the lack of possibility to challenge such treatment and the collective nature of the expulsion violated the right to due process and judicial guarantees.[62] According to this counter-argument, this would sufficiently provide justice for the victims of similar violations and render a finding under Article 3 useless.

This line of argument would deprive the *American Convention* of some of its meaning and of its specificity as a regional human rights instrument. The drafters of the convention, reflecting the unique history and social reality of the Americas, agreed on a right to juridical personality, whereas it is absent from other regional or international treaties. As the report of the 19th extraordinary session of the IACHR of July 1968 shows, those present "considered that the right to juridical personality, due to its importance as a substantive human rights, should be consecrated among those rights protected by the future convention".[63] This right was even included under Article 27 of the adopted treaty in the list of those rights not subject to suspension in

---

61 *Report of the Special Rapporteur on the Human Rights of Migrants*, *supra* note 55 at para 10 [emphasis added].

62 *Nadege Dorzema et al*, *supra* note 1 at para 150-178.

63 IACHR, *Informe Sobre La Labor Desarrollada Durante Su Décimonoveno Periodo De Sesiones* (Extraordinario), OR OEA/Ser.L/V/11.19, Doc 51, (1968), online: Washington College of Law <http://www.wcl.american.edu/humright/digest/sp19.cfm> [Translated by author].

any circumstances[64].

To interpret this right restrictively in cases of overlap with other rights would divest it from much of its meaning, especially since overlap between rights is frequent in international human rights adjudication. As the case of the *Guayubín Massacre* itself shows, the same facts can give rise to different human rights violations for the same persons. In this case, the excessive use of force gave rise to violations of the rights to life (Article 4), personal integrity (Article 5) and to be free from discrimination (Article 1) at the same time, and the arbitrary detention of the survivors led to violations both of the rights to personal liberty (Article 7) and to due process and judicial guarantees (Article 8). This exemplifies the principle according to which "All human rights are universal, indivisible and interdependent and interrelated" affirmed in the Vienna Declaration and Programme of Action.[65] In future similar cases, not finding a violation of the right to judicial personality could even undermine the victims' claim of violation of their right to due process and judicial guarantees (Article 8), since it suggests that they were not deprived of their capacity to exercise their rights. Finally, such a strict approach would contradict the pro persona principle of interpretation, according to which human rights treaties must be construed so as to achieve an effective protection of the human person, affirmed in the *Guayubín Massacre* case itself[66].

In the *Case of Hirsi Jamaa et al v Italy*, the ECHR specifically recognised that "the applicants had no access to a procedure to identify them" before their expulsion and that this constituted a further obstacle to their access to appropriate administrative or judicial remedies.[67] This suggests that, under the *European Convention*, personal identification is one of the components of the right to effective remedies. In similar situations occurring in the Americas, the text of the *American Convention* demands that such a violation be recognised in a freestanding way. If the IA Court, on the basis of a strict interpretation, were to continue to subsume such cases under its analysis of Article 8 of the *American Convention*, it would fail to recognise harm to a specific juridical good that the State Parties to this treaty explicitly affirmed and sought to protect.

VI. Conclusion

In this article, I have argued that, while the *Guayubín Massacre* case does not correspond "strictly" to the IA Court's two lines of cases rendered regarding Article 3 of the *American Convention*, it touches to the core of the right to juridical personality. Because the arbitrary detention of unidentified migrants negates both their existence as persons and their capacity to enjoy rights and undertake obligations, I argue that it points to a new set of circumstances recognisable as violation the right

---

64 *American Convention*, *supra* note 2, art 27.
65 *Vienna Declaration and Programme of Action*, UNGAOR, UN Doc A/CONF.157/23, (1993), art 5.
66 *Nadege Dorzema et al*, *supra* note 1 at para 136.
67 *Hirsi Jamaa et al*, *supra* note 27 at para 202.

to juridical personality in the future. The case law of the ECHR has proven particularly relevant in this analysis. It has underscored that under the functional equivalents of Article 3 of the *American Convention*, namely the right to effective remedies (Article 13 of the *European Convention*) and the prohibition on collective expulsions (Article 4 of *Protocol No 4*), the right to be recognised as an individual is of particular relevance in cases of collective expulsions.

To ensure a progressive development of the IA Court's case law, it may have been appropriate to adopt a strict interpretation of the right to juridical personality in the context of the very first case of collective expulsion of arbitrarily detained and unidentified migrants ever to be decided by the IA Court. However, in light of the pro persona principle of interpretation and of the importance to give full meaning to each article of the *American Convention*, future cases such as those of the *Guayubín Massacre* or the case of *Hirsi Jamaa et al v Italy* call for an application of Article 3. This would enhance the *American Convention*'s capacity to contribute to the global development of human rights from its unique regional perspective and be in keeping with its precious tradition of particular protection of the rights of those "in situations of vulnerability, exclusion and discrimination".[68]

[68] *Sawhoyamaxa Indigenous Community*, *supra* note 11 at para 189.