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INTRODUCTION

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

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INTRODUCTION

Bernard Duhaime and Christopher Campbell-Durufle***

On June 18th, 2000, a group of Haitian nationals was victim of a disproportionate and unjustified use of lethal force by personnel of the Dominican Border Forces Operations Post, when their vehicle did not stop at a road checkpoint. The soldiers opened fire on the truck, wounding and killing seven of its occupants. The survivors were arbitrarily detained, deprived of proper medical attention, and denied the right to seek legal or consular assistance. Furthermore, they were collectively expelled from the Dominican territory, without having been the object of any administrative or judicial proceedings, and none of those responsible was ever held accountable. These acts are, lastly, illustrative of a more fundamental human rights problem: the victims of this massacre were targeted because of their condition as migrants of Haitian origin.

This special volume of the *Quebec Journal of International Law* is dedicated to this tragic case. On October 24th, 2012, after more than 12 years of waiting for the victims and their families, the Inter-American Court of Human Rights rendered its judgment in the *Case of Nadège Dorzema et al v Dominican Republic*¹ (also called the case of the *Guayubín Massacre*). In this important judgment, the Court ruled that the Dominican Republic was internationally responsible for numerous breaches of the *American Convention on Human Rights*². The *Quebec Journal of International Law*³ has brought together a unique selection of jurists familiar with this case and the issues it addresses, to explain the judgment rendered and its significance for the ongoing process of fostering respect for the human rights of migrants and Afro-Descendants within the Dominican society and across the Americas.

In their introductory remarks, the directors of the *Quebec Journal of International Law*, Professor François Roch and Me Kristine Plouffe-Malette, present the activities of this unique legal journal, established in 1984 by the Société québécoise de droit international⁴. They also explain their editorial decision to publish a special edition on this historic decision. Then follow texts by members of the three associations that acted as representatives of the victims in the national and international proceedings of the *Guayubín Massacre* case. Professor Mirja Trilsch, director of the International Clinic for the Defense of Human Rights (CIDDHU),

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¹ *Nadège Dorzema et al (Dominican Republic)* (2012), Inter-Am Ct HR (Ser C) No 251, Annual Report of the Inter-American Court of Human Rights: 2012.

² *American Convention on Human Rights*, 22 November 1969, 1144 UNTS 143 at 212 (entered into force 18 July 1978) [*American Convention*].

³ *Quebec Journal of International Law*, online: Société Québécoise de droit international <<http://www.sqdi.org/fr/revue.html>>.

⁴ Société québécoise de droit international, online: Société québécoise de droit international <<http://www.sqdi.org/fr/index.html>>.

based at Université du Québec à Montréal (UQAM), situates such a complex litigation within the broader context of the global human rights clinic movement. She highlights how this unique kind of institution fosters access to international justice around the world, while at the same time providing a unique experiential learning opportunity for future human rights defenders. The *Guayubín Massacre* litigation in itself created the opportunity for the involvement of more than 50 students, *alumni*, and volunteer attorneys. Ms. Colette Lespinasse, coordinator of the Groupe d'appui aux rapatriés et aux réfugiés (GARR), presents the history of the case since 2000 from the perspective of this Haiti-based organisation, and the phenomenal efforts deployed, alongside the victims, in the pursuit of justice before domestic and international institutions in this country devastated by an earthquake in January 2010. She highlights how gathering evidence, from the victims residing in different locations and sometimes-uncooperative public authorities, was often an important challenge in their fight against impunity.

The reader will have the chance to learn from the observations on the particular case of the *Guayubín Massacre* by the United Nations Special Rapporteur on the Human Rights of Migrants, Professor François Crépeau. The Special Rapporteur warns against the instrumentalisation of migrants in political debates by those seeking to increase their popularity by promoting repressive policies, in contradiction with the available evidence and at the expense of already vulnerable individuals. He also highlights the fact that, except for the right to run for office and the right to enter and remain on the territory of a given country, migrants are endowed with each and every other human right.

The present volume of the *Quebec Journal of International Law* contains the integral text, in Spanish, of the original judgment delivered by the Inter-American Court of Human Rights on October 24th, 2012. This elaborate ruling contains a section on the admissibility of the evidence, the identification of the victims, a summary of the established facts, rulings on the various human rights violations alleged by the victims' representatives and the Inter-American Commission on Human Rights, and orders on reparations. An official English translation of the judgment is also available on the website of the Court.

The next section contains the skilful *amicus curiae* briefs presented to the Inter-American Court of Human Rights in Spanish by interveners from all around the world, and with the endorsement of more than fifty highly recognised signatories. The Consejo Latinoamericano de Estudiosos del Derecho Internacional y Comparado – República Dominicana⁵ (COLADIC-RD) presented the problems of statelessness faced by Dominicans of Haitian origin in the Dominican Republic, a critical analysis of the Dominican Republic's citizenship and migratory legislative framework in light of due process of law standards, and the context of structural discrimination faced by Haitians and Dominicans of Haitian origin in the Dominican Republic. The British

⁵ Consejo Latinoamericano de Estudiosos de Derecho Internacional y Comparado, online: Consejo Latinoamericano de Estudiosos de Derecho Internacional y Comparado <<http://www.coladic-rd.org>>.

non-governmental organisation Equal Rights Trust⁶ provided an in-depth treatment of international standards pertaining to the *jus cogens* prohibition of racial discrimination, the notions of systemic and indirect discrimination, and the positive duty of States to investigate alleged acts of discrimination. The Asylum and Human Rights Clinic of Boston University School of Law⁷ presented arguments on the obligation to treat all persons without discrimination, including irregular migrants, on the right to access status determination under the *Convention relating to the Status of Refugees*⁸, and on the militarisation of border-crossing procedures across the world. The Loyola Law School International Human Rights Clinic⁹ focused its contribution on the rights to juridical personality and to consular notification and assistance, and on the prohibition of collective expulsions in a comparative perspective. Special attention was given to discrimination as an aggravating circumstance. Finally, the Instituto de Derechos Humanos Bartolomé De Las Casas at Universidad Carlos III de Madrid¹⁰ provided an analysis of the right to life in the context of the use of force by law enforcement officials, by highlighting the standards established by the Inter-American and European case law and others of universal application.

This volume also includes a list of case comments from a broad range of perspectives. In her article, Ms. Paola Pelletier Quiñones, a Dominican human rights defender and former coordinator of COLADIC-RD, highlights that the *Guayubín Massacre* case must, sadly, be seen as only one manifestation of a much broader structural problem in the Dominican Republic. She provides personal insights with regards to this context and highlights the fact that human rights organisations that work on migratory issues in her country face a climate of hostility and xenophobia. Furthermore, she underlines the jurisprudential value of the *Guayubín Massacre* judgment, notably by developing the due process of law standards with regards to migrants, recognising a situation of indirect discrimination flowing from the actions of State agents, and identifying persons as victims for the purpose of the case notwithstanding the fact that they had not been identified as such by the Inter-American Commission on Human Rights in its initial pleadings.

Ms. Marie-Pier Dupont and Mr. Philippe-André Rodriguez, former CIDDHU students, discuss the challenges faced in the implementation of the *Guayubín Massacre* judgment. They rely on an analysis of the socio-historical context of *antihaitianism* observable in the Dominican Republic in light of Georg Wilhelm Friedrich Hegel's concept of identity and a review of opinions circulated in the Dominican press. They also discuss the impacts of the judgement rendered in the

⁶ The Equal Rights Trust, online: The Equal Rights Trust <<http://www.equalrightstrust.org/>>.

⁷ The Asylum and Human Rights Clinic of Boston University School of Law, online: <<http://www.bu.edu/law/central/jd/programs/clinics/civil/AHR.html/>>.

⁸ *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 at 221 (entered into force 22 April 1954).

⁹ The Loyola Law School International Human Rights Clinic, online <<http://www.lls.edu/academics/clinicexperientiallearning/internationalhumanrightsclinic/>>.

¹⁰ The Instituto de Derechos Humanos Bartolomé De Las Casas, online <http://www.uc3m.es/portal/page/portal/instituto_derechos_humanos/>.

*Case of the Yean and Bosico Children*¹¹ with regards to the situation of Dominico-Haitians and its degree of implementation by the Dominican Government, to formulate observations as to the expected level of compliance that the *Guayubín Massacre* judgment will receive.

In his article, Me Christopher Campbell-Durufié, member of the CIDDHU's team which appeared before the Inter-American Court of Human Rights in the *Guayubín Massacre* public hearing in June 2012, addresses the specific issue of the right to juridical personality. Indeed, the Court declined to make a finding of violation of Article 3 of the *American Convention*, as alleged by the victims' representatives. He argues, on the basis of a comparative analysis of the case law of the Inter-American and European courts of human rights, that future cases of arbitrary detention of migrants, when these are not duly identified, provide strong bases for concluding in a violation of this specific right.

Professor Bernard Duhaime, founder of the CIDDHU and lead counsel for the *Guayubín Massacre* case, and Me Catherine Lafontaine, former coordinator of the CIDDHU, focus their contribution on the Inter-American Court's treatment of the issue of discrimination. The authors highlight that the Court concluded that State agents had committed acts of direct discrimination against the victims of the case, taking into consideration their situation of special vulnerability and the five specific instances highlighted by the victims' representatives attesting that, at every contact with the State's agents, they suffered a distinct and discriminatory treatment. They observe that the Court acknowledged the existence of a context of discrimination against Haitian migrants and Dominicans of Haitian descent in the Dominican Republic and reaffirmed the necessity of reversing the burden of proof when addressing certain occurrences of racial discrimination.

Finally, Ms. Karla I. Quintana Osuna, former legal adviser of the Inter-American Commission on Human Right for the *Guayubín Massacre* case, provides enlightening concluding observations from the unique perspective of this institution. She presents the long history of engagement of the Commission with the situation of Haitians and Dominicans of Haitian descent in the Dominican Republic, notably through its 1999 report on the human rights situation in the Dominican Republic¹², the order for provisional measures sought before the Inter-American Court in 2000¹³, and the *Case of the Yean and Bosico Children* successfully litigated in 2000¹⁴. She argues that the *Guayubín Massacre* judgment is particularly important for having addressed, albeit indirectly, the context of structural discrimination affecting the Dominican Republic, and for setting a precedent regarding discrimination against migrants as a

¹¹ *The Yean and Bosico Children Case (Dominican Republic)* (2005), Inter-Am Ct HR (Ser C) No 130, *Annual Report of the Inter-American Court of Human Rights: 2005 [The Yean and Bosico Children Case]*.

¹² OAS, Inter-American Commission on Human Rights, *Report on the Human Rights Situation in the Dominican Republic*, OR OEA/Ser.L/V/II.04/Doc. 49, rev 1 (1999) at 317.

¹³ *Haitian and Haitian-Origin Dominican Persons in the Dominican Republic (Dominican Republic)* (2000), Order of the Inter-American Court of Human Rights, online : <http://www.corteidh.or.cr/docs/medidas/haitianos_se_04_ing.pdf>.

¹⁴ *The Yean and Bosico Children Case*, *supra* note 8.

particularly vulnerable group. Secondly, she stresses the significance of this case for having affirmed the prohibition on the use of lethal force by State officials against civilians, in this case migrants, who are running away without presenting an imminent threat to the life of anyone. Thirdly, she highlights how this judgment reaffirmed the lack of jurisdiction of military courts to rule on alleged human rights violations committed by members of the armed forces. Finally, she observes the importance of this judgement for consolidating the due process standards applicable to non-citizen facing expulsions and deportation procedures, on the first occasion presented to the Inter-American Court since the *Case of Vélez Loor v Panamá*¹⁵.

In closing, we hope that this special volume of the *Quebec Journal of International Law* will be a fitting tribute to all those who have come together on the tragic occasion of the *Guayubín Massacre*. By their resilience and their courage to come forward and demand justice despite structural racism, social and economic marginalisation, and extreme vulnerability, the victims of this tragic case of abuse of State powers are a true source of inspiration. Equally inspiring are the members of the GARR and CCDH, who have advocated relentlessly for these victims in often very difficult conditions. The Inter-American Commission on Human Rights, the many institutions who presented *amicus curiae* briefs before the Inter-American Court of Human Rights, and the numerous generations of CIDDHU students and supervisors who have devoted their time voluntarily to the success of this international litigation also played a decisive role in the success of this legal odyssey. All of these individuals and institutions, and so many others who joined their efforts to this cause, it should be remembered, do not seek to shame or discredit the Dominican people or its Government, but rather to contribute constructively to the edification of a Dominican society that is fair, inclusive, and respectful of human rights and the rule of law.

As many of the contributors to this special volume of the *Quebec Journal of International Law* have shown, the *Guayubín Massacre* is precedent-setting in many ways, including with regards to the protection of migrants as a particularly vulnerable group and to the elimination of racial discrimination, in the Dominican Republic and throughout the Americas. Unfortunately, at the time of writing, the journey is far from being over for the survivors of the *Guayubín Massacre* and for those defending the rights of Haitian Migrants and Dominicans of Haitian descent in the Dominican Republic. The struggle is currently ongoing to obtain the judgment's full implementation, as well as to eliminate direct and indirect discrimination against this vulnerable group through other national and international legal actions¹⁶. It is our hope that this volume, and the impressive efforts united in the course of this historical litigation, will contribute to this process and demonstrate that human rights can be translated from principle to reality, even in the starkest cases.

¹⁵ *Vélez Loor Case (Panama)* (2010), Inter-Am Ct HR (Ser C) No 218, Annual Report of the Inter-American Court of Human Rights: 2010.

¹⁶ See for example to ongoing case of *Benito Tide Méndez et al (Dominican Republic)* (2012), No. 12.271, OAS Press release, "IACHR Takes Case Involving Dominican Republic to the IA Court HR" (18 July 2012), online: Organization of American States <http://www.oas.org/en/iachr/media_center/PReleases/2012/091.asp>.